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THE HISTORY OF THE LAW REPORTS[1].

AMONGST the many law reforms which have been effected during the last twenty years, that of which Mr. Daniel has given us the history is by no means the least important. Considering that the law of this country consists of legislative enactments and of judicial decisions, it certainly does seem remarkable that the collection and publication of such decisions should be left entirely to private enterprise and not be undertaken by the Government of the country. Even Englishmen would think it strange if there were no authentic publication of Acts of Parliament; but the publication of law reports has been so long neglected by the Government that we are all accustomed to it, and are content with such reports as we are in the habit of getting without any assistance from the State.

One thing however we do not get, and perhaps cannot hope for under existing arrangements; and that is, one set of reports which is alone to be regarded as containing an authoritative exposition of the law as declared and applied in the instances reported. But until we have one publication of judicial decisions which, and which alone, shall be received and acted upon as authoritative by our numerous tribunals, all reforms in Law Reporting must be regarded as transitional and incomplete. We have not yet got what we want, but thanks to Mr. Daniel and those who laboured with him twenty years ago, we are in a much better position now than we were then.

Twenty years ago the state of things was intolerable. The reports of the superior courts of Law and Equity and of the Admiralty and Ecclesiastical Courts and of the House of Lords and Privy Council were all commercial undertakings carried on for profit. Competition was excessive, and the profits of each separate

[1] The History and Origin of the Law Reports, &c. By W. T. S. Daniel, Q.C., late Judge of County Courts, &c. London: William Clowes and Sons, Limited. 1884. Large 8vo., 359 pp.

publication were reduced accordingly; whilst the quantity of cases reported was vastly in excess of all reasonable requirements. The reporters were for the most part conscientious men, working under difficulties and often against time, striving to do their best, and producing, many of them, excellent work. But the waste of labour, time and money was prodigious; and instead of having one good set of reports to which all could appeal, professional men were compelled to take in several sets of reports in order to keep themselves fairly *au courant* with what was being decided in the various courts. There were indeed what were called authorised reports, i. e. reports published by reporters to whom greater facilities were given than to their competitors; but these reports were extremely expensive, and were very often greatly in arrear. Moreover, some of these were very inferior to their less favoured rivals. The authorised reports were a necessity to a limited class of men, and had a sure minimum sale. In some cases unfair advantages were taken of this circumstance, and dilatoriness, undue length, and collections of rubbish were the consequence. It cost £30 a year to take in a complete set of the authorised reports, and this did not include binding or any digest. Moreover, no man in practice could do without one or more of the irregular reports which were called into existence by the expense and defects of the authorised series. No wonder the Profession struck and made a vigorous attempt to remedy the evils from which it so severely suffered.

The history of this attempt will be found fully recorded in the work at the head of this article. The old authorised reports, and most, but not all, of the irregular reports, have disappeared; and instead the Profession has, for a small subscription, *first*, a set of reports of all the decisions worth reporting[1] in all the Divisions of the High Court, in the Court of Appeal, and in the House of Lords and Privy Council; *secondly*, short weekly notes of recent decisions; *thirdly*, a copy of the Public General Statutes of the year. In addition to this there has been a digest of cases published every few years, and furnished free of charge to those who subscribed to the entire series of the Law Reports; and last year a chronological table and index to the Statutes was also supplied to them. The reporters are much better paid than they were under the old system; and so financially successful have the *Law Reports* proved, that this year the annual subscription, which was only £5 5*s*., has been reduced to £4 4*s*. So far so good. Mr. Daniel, by whom, more than by any one else, this great improvement has been brought about, may be heartily congratulated on his success. Only those who laboured with him and saw behind the scenes can

[1] [If not more.—Ed.]

adequately appreciate the tact, good temper, and perseverance with which he overcame the many difficulties and obstacles he had to encounter. If he had many foes he made no enemies. He did not however work alone; he had valuable assistance from many members of the Legal Profession, and from Messrs. Clowes the printers; and he was fortunate enough to have as one of his zealous supporters the present Lord Chancellor, who was then Attorney-General, and who early took a great interest in the improvement of our system of law reporting.

The leading idea of Mr. Daniel's scheme and of the present system is co-operation as distinguished from competition. The various members of the Profession were urged to combine and produce what they wanted for themselves, and not to rely on the efforts of individuals acting without any system and simply with a view to their own interests.

In order to carry out this idea and to consider what ought to be done, a meeting of the Bar was convened in December, 1863, and a committee was then appointed to make inquiries and to report. The committee consisted of twenty-two members. They appear to have held twenty-four meetings. One of their first proceedings was to appoint a sub-committee to ascertain the various methods of law reporting adopted in foreign countries, and the result was a short but interesting report, which is worth preserving, and was as follows:—

'To begin with the system adopted in France. Every judicial decision is required to be in writing, and to be *motivé*, i.e. to disclose on the face of it the grounds and reasons on which it is founded. And when the signature of the President of the Tribunal has been affixed to these solemn judgments, it is the business of the Greffier to see them entered on the register of the Courts, and only one version of them can therefore ever legally appear.

'The records of the tribunals thus containing an authentic version of every decision, the legal profession and the public have at all times access to the register to ascertain what has from time to time been decided, and it is competent for any one to make from the register a selection of such decisions for publication. The collections of decisions by Sirey and Dalloz and Ledru Rollin have been thus prepared. Though these works are deservedly held in great esteem, they are not official publications, any more than any series of English Law Reports.

'In Norway and Sweden the judgments of the ordinary tribunals are always given in writing, and in every case entered on the protocols of the Courts. And in the Supreme Courts of Appeal, where the votes of the Judges are given separately, it is the business of the Registrar of the Court to enter on the records of the Court, not only the final judgment or conclusion, but the grounds and reasons

of the decision of each Judge. Here as in France, therefore, the records of the Court supply ample materials for the preparation of books of reports, or collections of decisions, and such publications are left wholly to free trade.

'In Denmark, though it is competent for any one to take down, print, and publish reports of cases and decisions of which he has himself taken notes, the only authentic version of judicial proceedings is the entry in the Dombistocol, under the hand of the Judge, containing not only the conclusion itself to which the Court has arrived, but the facts and reasons and grounds of the decision; and from these, selections of cases which may serve for precedents are made by the direction of the Courts, though it would seem that other selections made by competent private publishers would be received with equal attention.

'In Italy, all judicial decisions, whether civil or criminal, must be read aloud in open court, with the grounds in fact or law set out at length; and authentic minutes of the judicial opinions so pronounced are duly entered in the register of the Court; and compilations of the principal decisions of the four superior Courts of Cassation at Milan, Florence, Naples, and Palermo are published by voluntary editors, whose province it is to make a proper selection of cases for publication, to give an analysis of them in the head and marginal notes, and to explain or illustrate them in other annotations. These compilations only so far receive the protection of the State that a certain number of copies are subscribed for out of the public treasury. The compilation entitled 'La Legge Romana' is a journal of judicial and administrative proceedings for the kingdom of Italy, published at short intervals (the judicial three times a week), and containing in an abridged form notes taken from the minutes in the registers of all the important cases disposed of.

'In the United States of America there is no law requiring either written decisions or a record or register of the grounds and reasons of the decisions; but the judgments are generally in writing; and in most of the States, and in the Supreme Court of the United States, there are now official reporters, remunerated by salary as well as by a portion of the profits of the publications. These reporters are generally appointed by the State, and are always removable at the discretion of the appointing power, but enjoy in the performance of their duties the same freedom as the authors of our own Law Reports. In the Superior Courts of the city of New York the Judges publish the reports of their own decisions, choosing an editor from among themselves. As a rule, the official reports omit the argument of counsel, and give only a narrative of the facts and the copy of the written judgments. The official publication rarely appears for many months after the judgment is pronounced, and until that time publications called the 'Law Reporter' and 'Law Journal' are referred to, but do not profess to give more than the most important cases. No suggestion is made that the official reporters are less efficient or more dilatory than their predecessors under the voluntary system, nor is it found that they are subject to

any improper influence in the discharge of their duties; and in the State of New York the official reports are required by law to be sold at a much smaller price.'

No information was given to the committee as to law reporting in Germany, Holland, Belgium, Spain, or Portugal.

We do not propose to notice the various suggestions made to the committee, and considered or rejected by them. But one or two were important, and deserve mention.

It was soon found by the committee that among the first matters for consideration was, whether the Government should be requested to take the matter up and appoint official reporters to be paid by the State, and whether their reports should alone be cited as authoritative in the Courts. The committee however determined not to invoke Government aid unless convinced that no other scheme was practicable.

The Profession was very jealous of Government interference; and especially of Government patronage. Official reporters had been tried in days gone by, and the result was not satisfactory. The Year Books were the work of public functionaries[1], but they ceased in the reign of Henry VIII. Why, no one seems to have ascertained. In the reign of James I., Lord Bacon attempted to revive the system of official reporting which had been dropped in the reign of Henry VIII; and Hetley's Reports were the result of this attempt. His Reports are of little value, and official reporting again ceased. Warned by these failures, the committee felt reluctant to recommend a renewal of this system.

It was moreover deemed hopeless to obtain from Government the necessary funds to support an official staff of reporters, especially as such a charge would probably have involved compensation to existing interests, which were then both numerous and important.

The committee was of opinion that a scheme might be framed and carried out independently of the Government; and it ultimately recommended the formation of an unpaid council having under it two editors, a staff of reporters, and a secretary. This recommendation was submitted to a meeting of the Bar held in November, 1864, and was approved and ultimately carried into execution. The council thus formed consisted of two *ex officio* members, viz. the Attorney-General and Solicitor-General for the time being; of eight barristers, viz. two chosen by each of the four Inns of Court; of two serjeants, chosen by Serjeants' Inn; and of two solicitors, chosen by the Incorporated Law Society. Serjeants' Inn and

[1] Our authorities for this statement are Bacon and Plowden, persons not likely to have been misinformed on such a matter. The doubt cast on the fact in Mr. Hammond's notes to Lieber's Hermeneutics appears therefore to be unfounded.

Gray's Inn long held aloof, but both ultimately joined in the scheme. Serjeants' Inn has ceased to exist; but one of its members, Mr. Serjeant Pulling, is still a member of the council.

This council, which has since been incorporated by royal charter, is the distinguishing feature of our improved system of law reporting. The system is thoroughly English in its constitution and working. It is not founded on any abstract principle; it has no legislative authority; it has no monopoly; it exists because it is useful and supplies a professional want. The council appoints and can remove its editors and reporters, and it consists of men in practice who have to use its own productions. It is thus kept alive to all shortcomings, and it can and does apply itself to their prevention and cure. What it has done has already been shortly stated, and no small thanks are due to it for what it has accomplished during the nineteen years of its existence.

It would however be a mistake to suppose that the Law Reports are perfect and that there is no room for improvement in them. The fact that there are still other reports cited as authorities in our Courts is the one great defect in the present system. This remark is not intended to apply to ordinary newspaper reports. There is not only no objection to daily reports in newspapers of what takes place in our Courts, but the existence of such reports is on every account desirable. The public wishes to know, and is entitled to know, what takes place in the various Courts of the country; and no one is likely to complain of reports of this kind, except in cases the details of which are unfit for publication. But newspaper reports are worthless for purposes of reference or study. They are necessarily hastily prepared; they are intended only for the moment; and their purpose is answered when the paper in which they appear has been looked at. But the existence of reports such as 'The Law Journal,' 'The Weekly Reporter,' and 'The Law Times,' all of them intended for professional use and reference, is conclusive proof that the 'Law Reports' have not wholly succeeded in removing the evil which called them into existence. The causes of this comparative failure are worth considering.

The committee on whose report the present system is founded did not recommend a monopoly of citation. A resolution was moved to the effect that no case reported under the supervision and control of the council should be quoted from any other report, but this not to interfere with the quotation from any other report of cases not already so reported. This resolution however was negatived; the committee considering that such a restriction, although in the opinion of several of their members very desirable, should not form part of the scheme. The scheme therefore did not propose

to establish a monopoly by authority. Its omission in this respect naturally struck many persons as a serious defect, and as likely to cause the complete failure of the scheme. At the Bar meeting held in November, 1864, the late Mr. Joshua Williams moved an amendment to the report of the committee, '*That no reports of cases can be sanctioned by this meeting which are not invested by paramount authority with the privilege of exclusive citation,*' and he supported his amendment in a speech well deserving perusal (p. 214). The amendment however was put and lost, and the council had to set to work and do its best without any privilege of exclusive citation. This resolution rendered competition, and with it a multiplicity of reports and a continuance of the old evil, not only possible, but practically certain, unless the reports published by the council were superior to all others, and such as to satisfy all the legitimate wants of all branches of the Legal Profession. If the reports published by the council attained this high standard, it would be to the interest of the Profession to take no others; and others would accordingly disappear. But until such a standard is reached the object sought to be attained by means of the council and of its staff will still remain unrealised.

Let us consider then what are the legitimate wants of all branches of the Legal Profession with respect to law reports. They are both negative and affirmative.

The Profession does not want reports of cases valueless as precedents; nor long reports of complicated facts, when a short condensation of them is all that is necessary to understand the legal principle involved in the decision. This observation applies not only to the reports themselves, but particularly to the head notes of the cases reported. The legal pith of a case and nothing more should appear in its head note.

The affirmative wants may be considered under three heads, viz. 1. The subjects reported; 2. The mode of reporting them; 3. The time and form of their publication.

1. The subjects reported should include all cases which introduce or appear to introduce a new principle or new rule; or which materially modify an existing principle or rule; or which settle or tend to settle a question on which the law is doubtful; or which for any other reason are peculiarly instructive.

If these principles are not attended to, the reports will be unnecessarily bulky, and time and labour will be wasted. But in applying these principles to practice, it must be borne in mind that the reports are wanted not only by men who are already well-informed lawyers, but also by men of a different class; and for their sakes it is better to err on the side of reporting too many

cases than of reporting too few. Collections of rubbish must be carefully avoided; but if an experienced reporter is in doubt as to whether a case is worth reporting or not, it will be safer to report it, however shortly, than wholly to omit it.

Practically the great difficulty is to decide what ought to be done with cases turning on the construction of written documents and with what are called Practice cases. As regards cases on the construction of documents they should be excluded, unless there is some good reason for including them. Cases turning on obscure sentences in wills, contracts or letters which sorely puzzle those who have to put a meaning on them, are absolutely useless for future guidance, and should not be reported at all. At one time there was a tendency, especially in the Chancery Courts, to try and construe one will by means of decisions on other wills more or less like it; but this tendency has been checked of late years, and there is not now any excuse for reporting decisions on wills simply because they were difficult to construe. Similar observations apply to other documents. Some cases on the construction of documents are however very useful. Such are new lights thrown upon common forms, e.g. in charter parties, policies of insurance, ordinary covenants or trusts, &c., &c., or new interpretations of some Act of Parliament of general application, or of rules of Court. Cases of this kind are unquestionably useful as guides and should be reported.

Practice cases are useful, but only on points that are obscure and unsettled. As a rule they appear to be left by the council in the 'Weekly Notes;' and this is the best place for such of them as are not of unusual value. Revised selections of them might however be usefully published separately when a sufficient number had accumulated.

2. As regards the mode of reporting. The great point to bear in mind is that what the Profession wants is law, and such facts only as are necessary to enable the reader of the report to appreciate the law found in the case. Keeping this in mind, reports should be accurate, full in the sense of conveying everything material and useful, and as concise as is consistent with these requirements. The points contended for by counsel should be noticed, and the grounds on which the judgment is based should receive especial attention. The whole value of a report depends on this part of it, and on the distinctness with which it is brought out. In this respect much of course depends on the Judge and the care he takes to make plain the grounds of his decision. But much also depends upon the reporter. Even when a judgment is written, much of it may relate to matters requiring decision but not worth reporting; and it should be shortened accordingly.

The committee when preparing their scheme to be submitted to the Bar had to consider the question of written judgments. One of the propositions made to the committee was that it should recommend that all judgments of the Superior Courts should, as far as practicable, be written. But the committee did not deem it expedient formally to make any such recommendation. In this matter the committee was right. By judgment here is meant not the formal result of the decision, e.g. judgment for the plaintiff for 500*l.* and costs, or judgment for the defendant with costs, but the reasons given by the Judge for his decision. Now, if Judges were required to put all their judgments into writing, they could not possibly get through their work: it would be necessary to double their numbers in order to enable them to keep fairly up with the business they have to transact. Moreover, a large proportion of every Judge's decisions is of no interest whatever to any one except the parties actually affected. In most of the cases which come before him all difficulty is over when the facts are ascertained and mastered, and nothing would be gained by requiring him to put his judgment into writing. Even in cases heard on appeal it frequently happens that no written judgment is really wanted. No doubt judgments if written would be generally shorter and better expressed than when delivered off-hand and orally. But if an oral judgment is taken down and afterwards carefully revised, it is for all practical purposes as useful as if it had been written beforehand. In cases of real difficulty Judges take time to consider their judgments, and then they usually reduce them to writing. Practically this is found to be all that is wanted. It is, moreover, all that can be done without largely increasing the judicial staff. The committee recommended that the Judges should be requested to appropriate convenient places to be occupied by the reporters, to allow the reporters access to all such papers as they can control and to their written judgments, and themselves to revise the reports of their unwritten judgments before publication. The Judges, it is believed, assist the reporters in these respects, and thereby do what they can to insure accuracy in the judgments reported in the Law Reports.

3. As regards the time and form of publication, the Profession wants the reports published as speedily as possible, good print, good paper, a convenient portable size, convenient arrangement of matter, good indexes, and the lowest price consistent with the payment of the expenses of publication.

As regards print, paper, and price, the Law Reports are quite satisfactory; except that the price charged for odd back numbers appears unnecessarily high. But as regards speed in publication,

indexes, and arrangement of matter, the Law Reports are certainly capable of improvement.

The Law Reports are oftener in arrear than they should be. The numbers of Vol. XXVII. of the Chancery Division, published last November and December, afford striking examples of this defect. The November number contains *Lyell* v. *Kennedy*, decided by the Court of Appeal as long ago as the 8th of April; *In re Dominion of Canada Plumbago Co.*, decided by Pearson J. in February, and by the Court of Appeal in April; *Newson* v. *Pender*, decided by V.-C. Bacon in February, and by the Court of Appeal on May 1; *Rolls* v. *Miller*, decided by Pearson J. in March, and by the Court of Appeal in May; and several other cases decided in May. The December number contains cases decided in May, June, and July. Again, the December number of the Queen's Bench Division contains a case decided in March and several decided in July. The December number of the Probate Division contains a case decided in April. This is not as it should be.

One of the recommendations of the committee was that the November parts should comprise, as far as practicable, every decision not before reported up to the rising of the Courts for the Long Vacation; but the present practice of publishing next to nothing in September and October, and then publishing a whole volume in November and December, is clearly objectionable. Again, a judgment known to be appealed from is frequently not reported until the appeal from it can be reported also. The expediency of this practice is very questionable, when the Appeal Court is so much in arrear with its work as it unfortunately has been for the last few years. Delay in reporting decisions is a serious evil, and is one main reason why any other reports than the Law Reports continue to exist.

Again, it is questionable whether the present classification of the Law Reports is as convenient as might be. It is extremely convenient to large numbers of the Legal Profession to be able to separate certain classes of cases and bind them up together apart from other cases which they themselves seldom want. Such cases as relate to business transacted at Sessions and in Bankruptcy may be referred to as examples. It certainly would be convenient to many men, and to so many as to make their convenience worth studying, if all Criminal cases and cases useful at Sessions could be collected into a small compass and carried about. So with respect to Bankruptcy.

It is quite possible that the council may have weighed these and similar suggestions, and have decided that their own arrangement is best; but nothing ought to be neglected which increases the real

utility of their publications, or which tends to render similar publications unnecessary to any members of the Legal Profession.

The indexes to the Reports might also be improved; for they have much of the defects of the Digest, which is one of the most important of the council's publications. Its Digests are triennial, but in 1876, and again in 1882, consolidated Digests were published. They are no doubt useful, but they are very far indeed from being so useful as they might be. Their main defects are—1. that the titles under which the cases are collected are too few, and are often badly chosen; 2. that the titles themselves are not sufficiently subdivided into smaller divisions with separate headings; and 3. that the Digest is a Digest of cases, rather than of legal principles and rules with references to the cases which illustrate them.

A good Digest, not of cases, but of legal points decided in them, would be one of the most useful of books; if well done, it would not only be invaluable to practitioners, but it would also do more to improve the law as a science than anything which could be devised short of an authoritative code. A code is not within the scope of the functions of the council; but a Digest is; and the council should leave no effort unspared to make its Digest as perfect as possible.

The first point to determine is the arrangement of the matter digested: and, for practical use, an alphabetical arrangement of subjects is probably better than any other. For facility of reference nothing is so convenient as a series of titles in alphabetical order. A dictionary is far more useful for reference than any work arranged on scientific principles, even if accompanied by a good index. The council has done well therefore in adopting an alphabetical order for the titles.

The next point is to choose the titles, and to place everything under its proper title. Very often a case involves many legal points; and whenever this occurs each legal point should be placed under its own most appropriate head. A considerable amount of experience and skill is necessary to ensure a good selection of titles and to arrange the matter placed under them. The titles should be such as are likely to occur to those who consult the Digest; they should find what they want under the head under which they will probably look for it. Such a heading as 'Woman past child-bearing' would hardly occur to any one, and is decidedly bad. The appropriate heading is 'Presumptions,' where a lawyer would naturally look for a decision on such a point.

Again, speaking generally, a heading should not begin with an adjective, but should be a substantive. For example, such headings as 'Education' and 'Schools' are better than 'Elementary

Education' and 'Endowed Schools.' 'Lease' is better than 'Renewable Lease,' which should be a sub-heading of 'Lease.' 'Debt' is better than 'Specialty Debt,' which should be a sub-heading of 'Debt.' The editors of the council's Digest have not been happy in their choice of titles. Very few lawyers would think of looking for information under 'Lake.' They would turn to 'Fishing' or 'Water.'

Again, such cases as *Benjamin* v. *Storr*, L. R., 9 C. P. 400, and *Fritz* v. *Hobson*, 14 Ch. D. 542, are important decisions on the law of Nuisance, but are not to be found under that title save by pursuing an obscure cross reference. They are put under 'Highway;' one of them under 'Highway—Nuisance,' and the other under 'Highway—Obstruction.' The consequence is that the title 'Nuisance' is materially incomplete, and the bearing of these cases on that branch of the law is lost.

Neither is the matter under each title well arranged. The title 'Practice' in the Consolidated Digest of 1882 extends from column 2901 to column 3326. The cases relating to Interrogatories and Production of Documents, instead of being brought together, are to be found partly under the head 'Practice, Admiralty,' in cols. 2909 and 2910; partly under 'Practice, Chancery,' in cols. 2948 and 2957 to 2966; partly under 'Practice, Common Law,' in cols. 3036–3048; and partly under 'Practice, Supreme Court,' in cols. 3220–3231. If we turn to the head 'Discovery,' we find references to these and a great number of other places. The decisions on such important subjects as 'Interrogatories' and 'Production of Documents' ought to have been brought together and made sub-divisions of the title 'Discovery,' instead of being scattered about under the title 'Practice.' Both for reference and for study it is better to multiply the leading titles than to collect an enormous mass of matter under one title, even if subdivided into sub-heads.

In the Consolidated Digest each paragraph has headings in italics to catch the eye. The object is good; but the mode of obtaining it not the best. The eye is rather distracted than assisted by these italicised headings. If the headings of each paragraph were abolished, much printing would be saved and space gained; and if the matter digested were more broken up into groups, each with a heading indicative of the subject common to the whole group, the Digest would be greatly improved.

Again, the Digest is too much a Digest of Cases, and not enough a Digest of Principles and Rules. There are too many facts introduced, and the law is not sufficiently extracted. Let any one compare the Consolidated Digest with Comyns' Digest, which is almost perfect in this respect, and the difference will be at once apparent.

A Digest ought not to be a classified mass of the head-notes of the reports; it should be a classified mass of principles and rules, with no more facts than are necessary to indicate differences. Under each sub-head a general proposition should come first, and this proposition should be the most general its place will admit. Then should come qualifications and exceptions. A Digest framed on this principle would be invaluable. The Law Reports have existed long enough to furnish ample materials for such a work; the council has on its staff men quite competent to execute it, and funds ample for its publication. It could confer no greater boon on the Profession than by presenting it with a Consolidated Digest in a greatly improved shape. But this can only be done by re-casting the whole work.

The index to the statutes published by the Statute Law Committee is admirable; and the editors of the Consolidated Digest of cases cannot do better than study the preface to that work and be guided by it in the choice and subdivision of titles, on which the value of a Digest so much depends.

The Law Reports and the Digests are so extremely important to all branches of the Legal Profession, they are so valuable, not only to legal practitioners but to all persons who care for English Law as a scientific study or who take an interest in its development and improvement, that every member of the Profession ought to the best of his ability to assist in supporting and perfecting them. It is not too much to say that the Incorporated Council of Law Reporting for England and Wales discharges an important function of the State; and that the mode in which it does so is a matter of national and not merely Professional concern. The foregoing criticisms on its productions have been made with a view to their improvement and in no hostile spirit. The Council and its staff are engaged in a great work, and deserve all the support and encouragement the Profession can give them.

A multiplicity of law reports is a great evil. The evil was once intolerable; it may become so again; whether it will or will not depends on the Profession and on the Council. Let us hope it never will. If it does, a great effort will have failed, and its failure will prove the necessity for legislative interference and for a monopoly of Law Reporting.

NATHANIEL LINDLEY.

THE LUNACY LAWS.

IN the year 1877 a Select Committee of the House of Commons was appointed to inquire into 'the operation of the Lunacy Law, so far as regards the security afforded by it against violations of personal liberty.' The result of this inquiry was in some degree disappointing to those at whose instance it was undertaken. 'Assuming that the strongest cases against the present system were brought before us, allegations of *mala fides* or of serious abuses were not substantiated.' This was the unanimous report of the Committee; but its members were also agreed in thinking that every possible safeguard should be provided against abuse of a law 'which undoubtedly permits forcible arrest and deportation by private individuals.' They made a series of valuable suggestions for the improvement of our procedure in cases of lunacy. None of these suggestions has yet been carried out.

The sorrows and the triumphs of Mrs. Weldon have called attention once more to this subject. On the trial of *Weldon* v. *Semple*, Mr. Justice Hawkins said that the existing state of the law was such as to fill him with alarm, and expressed a hope that it would soon be altered. These strong expressions have given a fresh impulse to the zeal of the reformers; and the last few months have yielded a considerable crop of pamphlets, letters, and articles, setting forth the defects of the Lunacy Laws and of the persons who administer them. With personal charges we have here no concern; we shall perhaps be safe in assuming that doctors and commissioners are neither much better nor much worse than other men. The complaints which are made against the law itself are so numerous that we shall have to adopt a concise manner of dealing with them in order to bring them all within the limits of an article.

Some good people have been surprised and shocked to find that English law does not even attempt to define insanity. The old law drew a rough distinction between two classes of insane persons—the lunatic, who has been sane, and may become sane again; and the idiot or fool natural, who never has been and never will be *compos mentis*. This distinction ceased to be important when the Crown gave up the revenue which it derived from the lands of idiots. At an early period some difficulty was experienced in applying the legal definitions of lunatic and idiot to actual cases; and the general description 'a person of unsound mind' was

accepted as a good return to the writ *de lunatico* or *de idiotâ inquirendo*. Lord Hardwicke drew a distinction between unsoundness and mere weakness (*Ex parte Barnsley*, 3 Atk. 168). Lord Eldon, however, thought that the protection of the Court should be extended to a person whose mind was enfeebled by age. The result of *Ridgeway* v. *Darwin*, 8 Ves. 65, appears to be this: that a person suffering from senile dementia is not a lunatic, but is nevertheless a person to be protected by the issue of a writ 'in the nature of a writ *de lunatico*.' We are now almost entirely absolved from the difficult task of definition by the interpretation clause of the 8 and 9 Vict. c. 100. For the purposes of the Lunacy Acts, 'lunatic' means 'every insane person and every person being an idiot or lunatic or of unsound mind.' The force of interpretation (in the Parliamentary sense of the word) could no farther go.

In this one instance the law seems to have done well rather than ill in refusing to define the terms which it employs. If a definition of insanity were required, we should have to refer to some medical authority. But the medical definition of insanity is far too wide for legal purposes. Some doctors assure us that no man has a perfectly healthy brain; as the law more piously expresses it, 'perfect soundness of mind is not to be predicated, unless of the Deity.' The fact that a man is insane does not imply that he is subject to special disability or entitled to special protection and excuse. The law will not even consider whether a man is sane or not, unless some practical question turns on his sanity; and the practical questions of which the issue of sanity or insanity forms a part are, roughly speaking, four in number—whether a certain agreement shall be enforced; whether a certain will shall be upheld; whether a certain act shall be punished as a crime; whether the person alleged to be insane may be placed under restraint. It seems to me that the law deals with all these questions in the same spirit; and a brief recapitulation of some familiar rules may put this in a clear light.

No agreement is enforced against an insane person if his unsoundness of mind was such as to prevent him from knowing the nature of his promise, or if his unsoundness of mind was known to and turned to account by the other party to the agreement. If neither of these circumstances is proved, an insane person is certainly liable on an executed contract for the supply of things suitable to his station in life, and he is perhaps liable on other classes of contracts. There is no restriction on a lunatic's right to sue.

A will is not upheld if the testator's unsoundness of mind deprived him of the knowledge necessary for disposing of his property, or if it exposed him to the undue influence of others. If

neither of these circumstances is proved, partial unsoundness of mind does not affect the validity of the will.

An act otherwise criminal is not punished as a crime if the person committing it was so insane as not to know the nature of his act. If he knew the nature of his act, partial unsoundness of mind will not save him from punishment. The tendency of modern judges and juries is to give a person of partially unsound mind the benefit of the doubt.

The imposition of restraint is not justified by the mere fact of insanity. At common law, any person is justified in restraining a lunatic who is dangerous to himself or others. Provision has been made by statute for the arrest and detention of a lunatic (1) if he is found insane on arraignment or acquitted on the ground of insanity, (2) if he is likely to commit a crime and has no relation who will be responsible for him, (3) if he is found on inquisition to be incapable of managing himself and his affairs, (4) if he is certified to be a proper person to be detained under care and treatment, (5) if he is wandering at large, or cruelly treated, or otherwise a proper person to be sent to an asylum.

Nobody denies that the persons described in the foregoing paragraph ought to be placed under restraint. But it is asserted that the law gives facilities for the incarceration of persons not falling within any of the descriptions given, and for the undue detention of lunatics who have recovered. What measure of truth there is in these assertions will appear on reviewing the formalities necessary for placing an insane patient under 'care and treatment.' Setting aside criminal lunatics, who do not come within the scope of the Lunacy Laws, we find that insane patients are divided, for administrative purposes, into three classes.

1. *Pauper patients.* No pauper may be received into an asylum, hospital, or licensed house without an order signed by one justice, or by a parish clergyman and a relieving officer, nor without a certificate signed by one medical man who has examined him within seven days previous to his reception. The certificate sets forth that the person signing it is in actual practice, and that he has personally examined the lunatic: it also sets out the facts indicating insanity observed by the medical man, and facts indicating insanity communicated to him by others. This is the ordinary mode of consigning a pauper to an asylum, or to the control of any relation or friend who can satisfy the justice who inquires into the case, or the visiting justices of the asylum, that the lunatic will be properly cared for. The special procedure required by the clauses relating to lunatics at large, &c. does not materially differ from the ordinary form.

Strong statements have been made as to the insufficiency of the protection afforded by these forms; and no small part of the blue book of 1877 is devoted to the case of a lady who was said to have been sent to a pauper asylum by her parish clergyman because she insisted on making her living by photography in the immediate neighbourhood of her sister, who occupied a superior social position. This story completely failed to stand the mild tests to which it was subjected by the Committee; and no other case of abuse was made out under this head. A general objection is taken to the competence of the justices and clergymen who sign orders, and of the medical men who sign certificates. It is suggested that some scientific knowledge of insanity should be required of the persons who hold these momentous inquiries, on which the liberty of a fellow-citizen depends. But the proposal to commit such inquiries to experts in lunacy appears impracticable for various reasons. First, because experts would be almost certain to proceed on the medical rather than on the legal view of insanity. Second, because experts cannot be numerous; and great delay might be caused by the necessity of finding an expert to certify, at the very time when it is most important to place a lunatic under treatment. Third, because experts, constantly inquiring into cases of lunacy, would be virtually officials, and as such more liable to popular suspicion than local magistrates and practitioners.

Again, it is suggested that no person should be placed under restraint without a public inquiry before magistrates in sessions, or before a jury; and Magna Charta is sometimes invoked as an authority in favour of trial by jury. These proposals seem to be open to serious objection. In the year 1883, 14458 persons were admitted into establishments within the jurisdiction of the Lunacy Commissioners. Public inquiries in so large a number of cases would throw an enormous burden on our judicial system. And publicity would be so painful to the families and friends of insane persons that people would be tempted to keep their lunatic friends locked up at home, which is not desirable.

2. *Private Patients.* No person, other than a pauper, may be received into an asylum, &c. without an order signed by some person who has seen the patient within one month prior to its date, together with a statement of particulars signed by the same or some other person; nor without the certificates of two medical men, each of whom has separately examined the patient within seven days before his admission. In case of emergency, one certificate is sufficient, provided two other certificates are obtained within three days after admission. The certificates set out the same particulars as are required in the case of a pauper patient.

A certificate may not be given by a person interested in a licensed house or hospital, or by a medical man who signs the order.

It is plain that the order affords a very imperfect security to a private patient; for the person who signs it is not required to account for himself and to show the authority by which he acts. In Mrs. Weldon's case, the order was signed by a friend who called to see her, at her husband's request, in order that he might qualify himself to sign. There ought to be some process by which a husband in Mr. Weldon's position might be compelled to make himself responsible.

As to the medical certificates, I think the provisions of the law, when properly complied with, afford a tolerably sufficient security to persons placed under restraint as private patients. Serious cases of abuse have occurred; but in all the cases which have been proved, the law has been found to provide a remedy for the persons injured. In Mrs. Weldon's case, the 'separate examination' required by statute was hurried through in a perfunctory way; the two doctors made a joint call, and each left his colleague alone with Mrs. Weldon for a short time. The 'facts indicating insanity' were not stated with proper precision. It appeared that the doctor who took the lead in the examination was a personal friend of the doctor to whose house the patient was consigned, and that he had certified upwards of forty persons into the same house within ten years. A jury has awarded Mrs. Weldon 1000*l.* damages against one of the doctors, and she is endeavouring to obtain further redress from the other parties concerned in her incarceration. Clearly, the risk which a doctor runs in signing a certificate is very considerable—so considerable, that many medical men will not sign at all. If we deal with the doctors too strictly, the result will be that nobody will sign, unless perhaps a doctor who has no money to lose.

3. *Chancery Patients.* On a petition presented by some person interested, or on the report of a Lunacy Commissioner, an order may be made for an inquiry as to the sanity of a person having property, whom it is proposed to place under the protection of the Court. If the property is small the case may be dealt with summarily. The inquiry is usually held before a Master in Lunacy without a jury: a jury is granted in certain cases. The Master has the powers of a judge at nisi prius with special power to take evidence by affidavit or otherwise as may be convenient: his court is open to the public. If on inquisition a person is found to be of unsound mind and incapable of managing himself and his affairs, committees are appointed to take the control of his person and estate.

From this very brief outline it appears that the Chancery procedure fulfils the conditions laid down by those who demand a public inquiry into each case of lunacy. Some writers indeed have complained that the Master's Court is a 'hole-and-corner' Court, because it is held at or near the lunatic's residence; but these same writers would probably complain still more bitterly if the Court were held anywhere else. Others complain, with much better reason, that the procedure 'in lunacy' is slow and expensive. The costs incurred by a Chancery patient in superseding the inquisition when he is discharged on recovery are sometimes scandalously heavy.

Having considered the safeguards against unjust incarceration, we may proceed to consider the safeguards against undue detention. It is evidently desirable that a patient should be released from custody as soon as it is safe to let him go. In determining this question of safety, the doctor has often a very difficult duty to perform. A patient may become sane in an asylum and yet remain in such a state that he cannot return to the outer world without running the risk of an immediate relapse. In advising on such a case, the medical officer of an asylum or hospital is in a perfectly independent position. But the keeper of a licensed house has a pecuniary interest in the question of a patient's discharge; he has a certain capital at stake in his business; and each of his patients represents an annual payment which varies from 150*l.* to 600*l.*, the average payment in the best private asylums being about 280*l.* The proprietor of a private asylum may be, and usually is, disinterested in advising the friends of a patient not to remove him; but the fact of his pecuniary interest will always expose him to suspicion—he shall not escape calumny. And it is so important to exclude every cause of suspicion in these matters, that we may well consider whether private houses might not be dispensed with or transferred to some public authority. There are, however, two difficulties in the way of any such scheme. First, the private houses represent a large aggregate capital. In the second place, public authorities might not be able to provide those comforts which the upper classes demand for their lunatic friends. The abolition of private houses might lead to an increase in the number of single patients boarded out with doctors, &c.; and the authorities seem to think that single patients are on the whole worse off than those in asylums.

The safeguards against undue detention provided by the existing law fall under several heads.

1. Elaborate books are kept in every public and private asylum; these books are inspected by the visiting authorities; and state-

ments are regularly transmitted to the Commissioners, giving particulars as to the admission, discharge, death, escape, &c. of patients.

2. Letters written by private patients to the Commissioners or Visitors are required to be forwarded. Letters to other persons, if not forwarded, must be endorsed and kept for the inspection of the Commissioners or Visitors. Patients frequently complain that their letters are suppressed. If any such abuse should exist, it is due to violation of the law, and not apparently to any defect in the law.

3. It is plainly impossible to give the friends of a patient any general right of being admitted to visit him. But one Commissioner or Visitor has power to give an order for the admission of a friend or relative or of a medical man employed by a friend or relative.

4. The most important security against undue detention and ill-treatment is the visitation by public authorities of the places in which lunatics are received. County and borough asylums are visited six times a year by the Justices, and once a year by the Commissioners; the power of discharging patients is exercised by the Visiting Justices. Hospitals are visited, according to their respective regulations, by their Managing Committees; they also receive an annual visit from the Commissioners. Provincial licensed houses are visited four times in the year by two Visiting Justices, twice by one, and twice by the Commissioners. Metropolitan licensed houses are visited four times by two Commissioners, and twice by one. Single patients in unlicensed houses are visited as their cases require; most of them receive two visits a year from the Commissioners. (No person may receive more than one patient for profit without obtaining a licence for his house.) Chancery patients are visited by the Chancery Visitors; if they reside in private houses they are visited not less than twice a year. All the visits which I have enumerated are paid without warning, and may be paid on any day at any hour. Special visits and inquiries may be directed in certain cases by the Lord Chancellor and the Home Secretary; and the Commissioners make a good many special visits without being specially directed to do so.

It is suggested by some reformers that the visits of Justices and Commissioners are not sufficiently frequent. If, for example, a sane man were certified into a private asylum, he might have to wait six or eight weeks before having an opportunity to state his grievance. But a private patient may be discharged at any time by authority of the person signing the order; he may also write to the Commissioners to desire a special inquiry; and the Commissioners may

set him free at any time if they find the order and certificates irregular, or if two of them, making separate visits, find that the patient is not a fit person to be detained. Weekly or daily visitation would add little to the security afforded by these provisions, and would involve an enormous increase in the expense of working the Acts.

It is also suggested that visiting authorities do their work in a perfunctory manner; that they listen only to the doctors, and refuse to hear the patients. Such complaints must always be frequent; for of every six coherently speaking lunatics five at least believe themselves to be unjustly detained. If Visitors are sometimes content with superficial inquiries, it is clear that no great improvement can be effected in this respect by a mere alteration of the law.

The Lunacy Acts have no application to lunatics received into private houses, unless they are received for profit. There are therefore individuals and societies who keep insane persons under restraint without being liable to any sort of inspection or control. Some zealous Protestants assert that in Romish and Anglican convents insane nuns are kept locked up, as Mr. Rochester kept his first wife. There is probably some exaggeration in these stories; but it seems desirable that every person keeping a lunatic under restraint should at least be required to report to the Commissioners.

It remains to inquire what remedies and punishments are provided in case the safeguards enumerated should prove insufficient for the protection of any person, sane or insane, coming within the scope of the Lunacy Laws. Certain provisions in the Acts have been quoted to prove that they are drawn with a tender regard to the interest of the mad doctors. Thus the 8 and 9 Vict. c. 100. s. 99 enacts that a person acting under an order and certificates may plead the same in answer to any action or indictment; and s. 105 of the same Act requires an action in respect of anything done in pursuance of the Act to be brought within twelve months after the plaintiff's release. These enactments have really made very little alteration in the common-law liabilities of those who take part in placing a lunatic under restraint: witness the following cases.

In an action brought by a nephew against his uncle for signing an order for the nephew's confinement, defendant pleaded that the plaintiff behaved as an insane person, that two doctors certified him insane, as required by law, and that the defendant believed the certificates. The plea was held bad for not alleging insanity as a fact. (*Fletcher* v. *Fletcher*, 1 E. & E. 420; 28 L. J., Q. B. 134). In

this case it was held that s. 99 above cited does not protect the person signing the order.

In an action against a certifying doctor for negligence, Crompton, J., told the jury that a certificate is not given in pursuance of the Act, within the meaning of s. 105 above cited, if it is untrue in fact and signed without due inquiry. To take the case out of the protection of the Act, it is not necessary that the certificate should be untrue to the doctor's knowledge, or that he should have an improper motive. A doctor is not liable for a mere mistake: what degree of care he ought to take is a question for the jury (*Hall* v. *Semple*, 3 F. & F. 337). The jury found that the doctor believed in the truth of his certificate, and believed himself to be acting under the authority of the Act; but that he made his inquiries carelessly. Damages 150*l*.

In *Weldon* v. *Semple*, the jury having found both malice and negligence, Hawkins, J., said that the findings disposed of the pleas and objections founded on the Statutes. ('Times,' 29 July, 1884.)

In *Weldon* v. *Winslow*, Denman, J., said the question for the jury would be: Did the defendant act *bona fide*, under what he believed to be *bona fide* certificates, himself honestly believing the plaintiff to be of unsound mind? ('Times,' 28th Nov., 1884.)

On the other hand, the common-law right to restrain a lunatic is not affected by the statutes. Thus, on the return to a writ of habeas corpus, if it appear that the person confined is insane and unfit to be at large, the Court will not order his discharge, though the order and certificates are irregular (*Re Shuttleworth*, 9 Q. B. 651). The case is like that of a person irregularly committed, who will not be discharged on habeas corpus if it appears that there was good reason for committing him.

In an action against the keeper of a licensed house, it was held that s. 99 above cited was intended to make the order and certificates a complete justification for the defendant, 'without putting him to the trouble and expense of making out the fact which is certified to him to be actually true.' If the person certified is in fact sane, the proper remedy is by habeas corpus or by application to the Commissioners. (*Norris* v. *Seed*, 3 Exch. 782.)

The Lunacy Acts do not affect the right to prosecute for any act which amounts to a crime or offence under the ordinary criminal law. But the right to prosecute for offences against the Acts themselves is confined to the Commissioners and Visiting Justices, and the Home Secretary. This restriction is much complained of; but there is something to be said in favour of it. Persons in charge of lunatics must do many acts which are justified only by necessity, or by the extreme difficulty of the duties which they perform.

Thus an attendant may injure a maniac patient in defending his own life; or a medical officer may make a misleading entry in his books without any intention to deceive. In such cases it seems fair that an impartial administrative authority should inquire into the circumstances, and decide whether there ought to be a prosecution.

The Lunacy Acts have made considerable additions to the list of indictable offences. Any person is guilty of a misdemeanour, (1) if he acts as a Commissioner, &c. while interested in a licensed house; (2) if he makes a false statement in a certificate, application for licence, register of admissions, &c.; (3) if he receives a patient without giving notice, or without the required order and certificate or certificates; (4) if he receives a single patient without giving notice to the Commissioners, or if he receives more than one patient in an unlicensed house; (5) if he refuses or neglects to show any patient or any part of an asylum of which he is in charge to the visiting authorities, or fails to give true and full answers to the questions they put; (6) if he ill-treats any lunatic of whom he is in charge. A husband was indicted for ill-treating his lunatic wife: it was held that he was in charge of her as her husband and not under the Acts; and so much of the conviction as related to the statutes was quashed (*R.* v. *Rundle*, 1 Dearsly, 486). But a person who undertook the care of his lunatic brother was held to be within the Acts (*R.* v. *Porter*, 33 L. J., M. C. 126).

Minor offences against the Acts are made punishable by fines varying from 2*l.* to 50*l.* Any medical man who commits an act (not being a misdemeanour) contrary to the Acts is guilty of an offence.

I have endeavoured to give, in a brief compass, a fairly complete account of those provisions of the Lunacy Laws which concern the safety and the liberty of the subject. In a few points the law is seriously defective; in many points it admits of improvement; but its principles are sound, and its forms afford a better security against abuse than most people suppose. It is too much the fashion of the present day to blame the law as often as anything goes wrong. For example, the verdict in *Weldon* v. *Semple* is taken to justify the statement that the Lunacy Laws are in a scandalous state. It appears to me that the findings in that case were really to this effect: that the law provided adequate safeguards for Mrs. Weldon, and that the safeguards were rendered useless by the negligence and dishonesty of certain individuals. The only change in the law which would meet the case would be a short Act to provide that no doctor shall be negligent or dishonest.

But without admitting that the existing law is essentially unjust or oppressive, we may find in it ample scope for the exercise of

reforming energy. I venture to offer the following suggestions towards the amendment of the Lunacy Laws. They are founded in part on the recommendations of the Committee of 1877.

The administrative law relating to lunatics should be re-drawn in a style as simple as the nature of the subject will permit. The exceptional status of the Chancery lunatic should be taken away, and the process of placing a lunatic in confinement should be made the same in all cases. In each case we should require (1) An order, accompanied by a statement considerably more detailed than the statement now required. Information should be given as to the lunatic's relations, property, &c., the authority of the person signing the order, and, if there is a nearer relation, the reasons why such relation does not sign. (2) The certificates of two doctors, who should examine and report separately, not communicating with each other or with the medical officer to whose care the patient is consigned. 'Facts indicating insanity communicated by others' should be verified by written statements, signed by the witnesses relied on. In the case of a pauper, the parish clergyman should have power to sign an order; a magistrate should have power to sign the order, and to dispense with one of the certificates if he thinks the case free from doubt. If a relative or friend signs the order, the Commissioners should have power to register him as the lunatic's guardian, and to appoint the same or some other person to be trustee of the lunatic's property and business if any. Guardian and trustee should account to the Commissioners when required; if the property is large, they should act under the directions of the Chancery Division.

The Chancery Visitors should be combined with the Commissioners, and the work of visitation better distributed. The Masters would be the appropriate officers to hold special inquiries of importance.

Facilities might be given for transferring private asylums to local authorities or others who would undertake to conduct them without profit.

All persons keeping lunatics privately without profit should report to the Commissioners. Such reports should be treated as confidential; but the Commissioners should have power to send a medical man to make inquiries in such cases. The police should report all lunatics whom they know to be kept under restraint in unlicensed houses.

A lunatic discharged on recovery should be furnished with a memorandum showing when and by whom he was placed in confinement, the nature of his case, &c., and instructing him how to obtain further information if he requires it.

The effect of the foregoing proposals on the existing practice 'in lunacy' may be thus summarised:—

1. It is proposed to do away with the necessity of an inquiry by a Master in the case of a person placed under the protection of the Court. If I may judge from the evidence passed by the Masters in some recent cases, the inquiry affords no security beyond that which is afforded by requiring two medical certificates.

2. It is proposed to extend the protection of the Court to every lunatic for whom the Commissioners may think fit to assign a guardian or trustee. In *Vane* v. *Vane*, 2 Ch. D. 124, Sir G. Jessel said that the Court had original jurisdiction to give directions as to the guardianship and maintenance of a lunatic, but that this power would not be exercised unless where the property was small and it was not intended to take proceedings in lunacy. But in *Re Bligh*, 12 Ch. D. 364, James and Cotton LJJ. said the Court had no power to appoint a guardian, and could not give directions as to maintenance, unless by way of administering a trust. The proposal is, to confer or confirm the power claimed by Sir G. Jessel, while avoiding expense by making it possible to obtain a guardian or trustee without application to the Court.

T. Raleigh.

EARLY ENGLISH EQUITY.

I. *Uses.*

AT the end of the reign of Henry V. the Court of Chancery was one of the established courts of the realm. I think we may assume that it had already borrowed the procedure of the Canon law, which had been developed into a perfected system at the beginning of the thirteenth century, at about the same time that the Chancellor became the most important member of the King's Council. It had the 'Examination and oath of the parties according to the form of the civil law and the law of Holy Church in subversion of the common law[1].' It had the subpoena, which also it did not invent[2], and it had a form of decree requiring personal obedience[3].

Down to the end of the same reign (Henry V.) there is no evidence of the Chancery having known or enforced any substantive doctrines different from those which were recognized in the other courts except two. One of them, a peculiar view of contract, has left no traces in modern law. But the other is the greatest contribution to the substantive law which has ever been set down to the credit of the Chancery. I refer to Uses, the parent of our modern trusts. I propose to discuss these two doctrines in a summary way as the first step toward answering the question of the part which Equity has played in the development of English law.

As a preliminary, I ought to state that I assume without discussion that the references to *aequitas* in Glanvill, Bracton, and some of the early statutes passed before the existence of a Chancery jurisdiction, have no bearing on that question[4]. I ought also to say

[1] 4 Rot. Parl. 84 (3 Hen. V. pt. 2. 46, no. xxiii).

[2] See writ addressed to sheriff, Rot. Claus. 16 Hen. III. m. 2 dorso in 1 Royal Letters, Hen. III. (Rolls ed.), 523. Proc. Privy Council (Nicholas) passim. Stat. 20 Ed. III. c. 5. The penalty was usually money, but might be life and limb; 1 Proc. Priv. Counc. (21 R. II. A. D. 1397). The citation of Rot. Parl. 14 Ed. III. in 1 Roll. Abr. 372, which misleads Spence (1 Eq. 338 n.) and earlier and later writers, should be 14 Ed. IV. (6 Rot. Parl. 143), as pointed out already by Blackstone, 3 Comm. 52 n. We also find the writ *Quibusdam certis de causis*, a writ in the form of the subpoena except that it omitted the penalty; Palgrave, King's Council, pp. 131, 132, note X; *Scaldewell* v. *Stormesworth*, 1 Cal. Ch. 5.

[3] See *Audeley* v. *Audeley*, Rot. Claus. 40 Ed. III, '*sur peine* de sys mill livres au paier au roy,' cited Palg. King's Council, 67, 68; 2 Cal. Ch. x. See prayer in 3 Rot. Parl. 61 (2 R. II. 26). Imprisonment for contempt again is older than the Chancery, e. g. Mem. in Scacc. 27 (M. 22 Ed. I) in Maynard's Y. B. part 1.

[4] Glanvill, Prologus, Bracton, fol. 23 *b*; ib. 3 *b*, 'Aequitas quasi aequalitas.' Fleta, ii. c. 55, § 9. Petition of Barons, c. 27 (A. D. 1258), in Annals of Burton (Rolls ed.), 443, and Stubbs, Select Charters, for remedy *ex aequitate juris* by writ of entry or otherwise. Dictum de Kenilworth, pr. (A. D. 1266) Stat. of Realm, 51 Hen. III, and Stubbs, Select Charters; Close Rolls of Hen. III, cited in Hardy, Int. to Close Rolls, xxviii. n. 5 (8vo. ed. p. 111). So 'right and equite,' letter missive of Hen. V. to Chancellor, 1 Cal. Ch. xvi.

that the matters of grace and favour which came before the Council and afterwards before the Chancellor do not appear to have been matters in which the substantive rules of the common law needed to be or were modified by new principles, but were simply cases which, being for some reason without the jurisdiction of the King's ordinary courts, either were brought within that jurisdiction by special order, or were adjudged directly by the Council or the Chancellor according to the principles of the ordinary courts[1].

I agree with the late Mr. Adams[2] that the most important contribution of the Chancery has been its (borrowed) procedure. But I wish to controvert the error that its substantive law is merely the product of that procedure. And, on the other hand, I wish to show that the Chancery, in its first establishment at least, did not appear as embodying the superior ethical standards of a comparatively modern state of society correcting the defects of a more archaic system. With these objects in view, I proceed to consider the two peculiar doctrines which I have mentioned.

First, as to Uses. The feoffee to uses of the early English law corresponds point by point to the Salman of the early German law, as described by Beseler fifty years ago[3]. The Salman, like the feoffee, was a person to whom land was transferred in order that he might make a conveyance according to his grantor's directions[4].

[1] Supervisory powers of Council over the Court, 1 Gesta Hen. II. (Ben. Abbas, Rolls ed.), 207, 208; Assize of Northampton, § 7, ib. 110; and in Stubbs, Select Charters. Jurisdiction of Curia Regis over pleas of land, not coming there as a matter of course, acquired by special order: 'Quod debeat *vel dominus Rex velit* in curia sua deduci;' Glanv. i. c. 5. Jurisdiction of actions of contract *de gratia;* Bracton, fol. 100 *a*; Case referred by Chancellor to Curia Regis, 38 Ed. III., Hardy, Int. to Close Rolls, xxix (8vo. ed. 113 n.). Grants of jurisdiction *de gratia* in the form of Special Commissions of over and terminer complained of, Palgr. King's Council, §§ 12, 13, pp. 27-33; Stat. Westm. ii (13 Ed. I.) c. 29; 1 Rot. Parl. 290 (8 Ed. II. no. 8); Stat. Northampton (2 Ed. III.), c. 7; 2 Rot. Parl. 286, 38 Ed. III. 14, no. vi; 3 Rot. Parl. 161 (7 R. II. no. 43).

As to cases terminated before the Council, see Rot. Claus. 8 Ed. I. m. 6 dorso, in Ryley, Plac. Parl. 442, and in 2 Stubbs, Const. Hist. 263. n. 1; 2 Rot. Parl. 228 (25 Ed. III. no. 16; cf. no. 19). 3 Rot. Parl. 44 (3 R. II. no. 49) seems mistranslated by Parkes, Hist. Ct. of Ch. 39, 40. Matters at common law and of grace to be pursued before the Chancellor; Rot. Claus. 22 Ed. III. p. 2. m. 2 dorso, cited Hardy, Int. to Close Rolls, xxviii. (8vo. ed. 110), and Parkes, Hist. Court of Ch. 35, 36, n. See Stat. 27 Ed. III. st. 1. c. 1; Stat. 36 Ed. III. st. 1. c. 9. All the reported cases in Chancery through Henry V., with the exceptions which have been mentioned, are trespasses, disseisins, and the like. And the want of remedy at law is generally due to maintenance and the power of the defendant, or in one instance to the technical inability of the plaintiff to sue the defendant (2 Cal. Ch. viii.), not to the nature of the right invoked. The object of the repeated prayers of the Commons from Richard II. to Henry VI. directed against the Council and the Chancellor, was that common law cases should be tried in the regular courts, not that the ancient doctrine might prevail over a younger and rival system. See Adams, Equity, Introduction, xxxiii-xxxv.

[2] Adams, Equity, Introd. xxxv.

[3] Beseler, Erbverträgen, i. § 16. pp. 277 et seq., 283, 271.

[4] Beseler, i. §§ 15, 16; Heusler, Gewere, 478. Compare 2 Cal. Ch. iii.; 1 id. xlviii. and passim. 'Pernancy of profits, *execution of estates*, and defence of the land, are the three points of the trust' or use. Bacon, Reading on Stat. of Uses, Works (ed. Spedding), vii. p. 401; 1 Cruise, Dig. Title XI. ch. 2. § 6; see Tit. XII. ch. 1. § 3; ch. 4. § 1. Some of the first feoffments to the use (*ad opus*) of another than the feoffee which I have found

Most frequently the conveyance was to be made after the grantor's death, the grantor reserving the use of the land to himself during his life[1]. To meet the chance of the Salman's death before the time for conveyance over, it was common to employ more than one[2], and persons of importance were selected for the office[3]. The essence of the relation was the *fiducia* or trust reposed in the *fidelis manus*[4], who sometimes confirmed his obligation by an oath or covenant[5].

This likeness between the Salman and the feoffees to uses would be enough, without more, to satisfy me that the latter was the former transplanted. But there is a further and peculiar mark which, I think, must convince every one, irrespective of any general views as to the origin of the common law.

Beseler has shown that the executor of the early German will was simply a Salman whose duty it was to see legacies and so forth paid if the heirs refused. The *heres institutus* being unknown, the foreign law which introduced wills laid hold of the native institution as a means of carrying them into effect. Under the influence of the foreign law an actual transfer of the property ceased to be required. It was enough that the testator designated the executors and that they accepted the trust; and thus it was that their appointment did not make the will irrevocable, as a gift with actual delivery for distribution after the donor's death would have been[6].

There can be no doubt of the identity of the continental executor and the officer of the same name described by Glanvill; and thus the connection between the English and the German law is made certain. The executor described by Glanvill was not a universal

mentioned by that name seem to have been a means of conveying property to the *cestui que use* in his absence, very like the earliest employment of the salman. But as the conveyances are supposed to be made to servants of private persons (Bract. fol. 193 *b*) or officers of the king, it may be doubtful whether any inference can be drawn from them; 1 Royal Letters, Henry III. pp. 122, 420; cf. 421 (A. D. 1220, 1223). Compare Provisions of Oxford (Oath of guardians of king's castles) in Annals of Burton (Rolls ed.), 448, and Stubbs, Select Charters. And it seems doubtful whether the expression *ad opus* was used at first in a technical sense, e. g. 'castellum Dofris . . ad opus meum te facturum,' Eadmer (Rolls ed.), 7. 'Ad opus ejusdem mulieris,' 2 Gesta Hen II. (Ben. Abbas, Rolls ed.), 160, 161; Y. B. 3 Ed. III. 5. pl. 13; 2 Rot. Parl. 286 (38 Ed. III. 14. no. vi). But as early as 22 Ass. pl. 72. fol. 101, in the case of a gift alleged to be fraudulent, we find the court inquiring who took the profits, and on the inquest answering that the donor did, Thorp declares that the gift only made the donee guardian of the chattels to the use of the donor. See further St. 7 R. II. c. 12.

[1] Beseler, i. § 16. pp. 277 et seq.; Heusler, supra. Nearly every feoffment mentioned in the Calendars of Proceedings in Chancery down to the end of Henry VI. is for the purpose of distribution after death. 1 Cal. Ch. xxi. xxxv. xliii. liv. lv. lvi; 2 id. iii. xix. xx. xxi. xxii. xxxiii. xxxvi. &c. Abbrev. Plac. 179. col. 2, Norht. rot. 15 do.; ib. 272, H. 9 Ed. I, Suff. rot. 17. Fitz. Abr. *Subpena*, pl. 22, 23; Littleton, § 462.

[2] Beseler, i. p. 283; 2 Cal. Ch. iii.

[3] Beseler, i. p. 271.

[4] Beseler, i. p. 267: 'Fidei suae committens,' ib. 286. Compare the references to good faith in all the bills in Cal. Ch.

[5] Beseler, i. pp. 265–267; 2 Cal. Ch. iii. xxviii.; 1 id. lv.

[6] Beseler, Erbverträgen, i. pp. 284–288; Brunner in 1 Holtzendorff, Encyclop. (3rd ed.), 216; cf. Littleton, § 168.

successor. Indeed, as I have shown in my book on the Common Law, the executor had not come to be so regarded, nor taken the place of the heir in the King's courts even as late as Bracton. To save space I do not copy Glanvill's words, but it will be seen on reading that the function of the executor was not to pay debts—that was the heir's business [1], but to cause to stand the reasonable division of the testator as against the heirs [2]. The meaning of this function will be further explained when I come to deal with the rights of the *cestui que use* [3].

The executor had already got his peculiar name in Glanvill's time, and it would rather seem that already it had ceased to be necessary for the testator to give him possession or seizin. But, however this may be, it is certain that when the testator's tenements were devisable by custom, the executor was put in possession either by the testator in his life-time or else immediately after the testator's death. As late as Edward I. 'it seemed to the court as to tenements in cities and boroughs which are left by will (*que legata sunt*) and concerning which there should be no proceeding in the King's Court, because it belongs to the ecclesiastical forum [4], that first after the death of the testator the will should be proved before the ordinary, and the will having been proved, the mayor and bailiffs of the city ought to deliver seizin of the devised and devisable tenements (*de tenementis legatis et que sunt legabilia*) to the executors of the will saving the rights of every one [5].' A little later the executor ceased to intervene at all, and the devisees might enter directly. Or, if the heir held them out, might have the writ *Ex gravi querela* [6].

[1] Glanv. vii. c. 8; see xiii. c. 15; Dial. de Scaccario, II. 18; Regiam Majestatem, II. c. 39.

[2] Glanv. vii. c. 6–8.

[3] As to the functions of the executor in the time of Bracton, see The Common Law, 348, 349, and further, Bracton, fol. 407 *b*, 'Et sicut dantur haeredibus contra debitores et non executoribus ita dantur actiones creditoribus contra haeredes et non contra executores.' Ibid. fol. 98 *a*, 101 *a*, 113 *b*; Stat. 3 Ed. I. c. 19. The change of the executor to universal successor upon the obvious analogy of the haeres was inevitable, and took place shortly after Bracton wrote. It was held that debt lay against and for executors; Y. B. 20 & 21 Ed. I. 374; 30 Ed. I. 238. See further, Stat. Westm. ii. 13 Ed. I. cc. 19, 23 (A. D. 1285); Fleta, ii. c. 62. §§ 8–13; c. 70. § 5; and c. 57. §§ 13, 14, copying, but modifying, Bract. fol. 61 *a*, *b*, 407 *b* supra. As to covenant, see Y. B. 48 Ed. III. 1, 2. pl. 4. The heir ceased to be bound unless named; Fleta, ii. c. 62. § 10; The Common Law, 348; cf. Fitz. Abr. *Dett*, pl. 139 (P. 13 Ed. III.). Finally, Doctor and Student, i. c. 19, ad finem, speaks of 'the heir which in the law of England is called the executor.' In early English, as in early German law, neither heir (Y. B. 32 & 33 Ed. I. 507. 508) nor executor was liable for the parol debts of ancestor or testator (Y. B. 22 Ed. I. 456; 41 Ed. III. 13. pl. 3; 11 Hen. VII. 26; 12 Hen. VIII. 11. pl. 3; Dr. and Stud. ii. c. 24), because not knowing the facts they could not wage their law: Y. B. 22 Ed. I. 456; Laband, Vermögensrechtlichen Klagen, pp. 15, 16.

[4] Cf. Bract. fol. 407 *b*.

[5] Abbr. Plac. 284, 285 (H. 19 Ed. I. Devon. rot. 51). Note the likening of such tenements to chattels, Bract. 407 *b*; 40 Ass. pl. 41; Co. Lit. 111 *a*.

[6] 39 Ass. pl. 6, fol. 232, 233, where there is no question of the executor, but special custom determines whether the devisee shall enter, be put in by the bailiff, or have the

If, as I think, it is sufficiently clear that in the reign of Edward I. the distinction between an executor and feoffee to uses was still in embryo, it is unnecessary to search the English books for evidence of the first stage when the testator transferred possession in his own lifetime. A case in 55 Henry III. shows executors seized for the purpose of applying the land to pious uses under a last will, and defending their seizin in their official capacity, but does not disclose how they obtained possession[1]. A little earlier still Matthew Paris speaks of one who, being too weak to make a last will, makes a friend *expressorem et executorem*[2]. It is a little hard to distinguish between such a transaction and a feoffment to uses by a few words spoken on a death-bed, such as is recorded in the reign of Henry VI.[3] But the most striking evidence of the persistence of ancient custom was furnished by King Edward III. in person, who enfeoffed his executors, manifestly for the purpose of making such distribution after his death as he should direct; but because he declared no trust at the time, and did not give his directions until afterwards, the judges in Parliament declared that the executors were not bound, or, as it was then put, that there was no condition[4].

Gifts *inter vivos* for distribution after death remained in use till later times[5]. And it may be accident, or it may be a reminiscence of ancient tradition, when, under Edward IV., the Court, in holding that executors cannot have account against one to whom the testator has given money to dispose of for the good of his soul, says that as to that money the donee is the executor[6].

At all events, from an early date, if not in Glanvill's time, the necessity of a formal delivery of devised land to the executor was got rid of in England as Beseler says that it was on the Continent. The law of England did in general follow its continental original in requiring the two elements of *traditio* and *investitura* for a perfect conveyance[7]. But the Church complained of the secular courts

writ. In Littleton's time the devisee's right of entry was general; § 167; Co. Lit. 111. As to the writ, see 40 Ass. pl. 41. fol. 250; F. N. B. 198 L. et seq.; Co. Lit. 111. The only writ mentioned by Glanvill seems to be given to the executor, or if there is no executor to the *propinqui*; lib. vii. cc. 6, 7. Of course I am not speaking of cases where the executors were also the devisees, although even in such cases there was a tendency to deny them any estate, if there was a trust; 39 Ass. pl. 17; Litt. § 169.

[1] Abbrev. Plac. 179. col. 2; Norht. rot. 15 in dorso.

[2] 4 Matt. Paris, Chron. Maj. (Rolls ed.) 605, A.D. 1247.

[3] 1 Cal. Ch. xliii.; S. C. Digby. Hist. Law of Real Prop. (2nd ed.), 301, 302. Cf. Heusler, Gewere, 478, citing Meichelbeck (1 Hist. Fris. Pars instrumentaria), no. 300; 'Valida egritudine depressus traditionem in manus proximorum suorum posuit, eo modo, si ipse ea egritudine obisset, ut vice illius traditionem perfecissent.'

[4] 3 Rot. Parl. 60. 61 (2 R. II. nos. 25, 26).

[5] *Babington* v. *Gull*, 1 Cal. Ch. lvi; *Mayhewe* v. *Gardener*, 1 Cal. Ch. xcix, c.

[6] Y. B. 8 Ed. IV. 5. pl. 12. In *Mayhewe* v. *Gardener*, 1 Cal. Ch. xcix, c, the defendant, who had received all the property of a deceased person by gift in trust to pay debts, &c., was decreed to pay dilapidations for which the deceased was liable.

[7] Glanv. vii. c. 1. § 3; Annals of Burton (Rolls ed.), 421 (A. D. 1258); Bracton, fols. 38 *a*, *b*, 39 *b*, 169 *b*, 194 *b*, 213 *b*. § 3, 214 *b*; Abbr. Plac. 272 (H. 9 Ed. I.), Suff. rot. 17;

for requiring a change of possession when there was a deed [1]. And it was perhaps because wills belonged to the spiritual jurisdiction that the requirement was relaxed in the case of executors. As has been shown above, in the reign of Edward I. possession was not delivered until after the testator's death, and in that of Edward III. it had ceased to be delivered to them at all. Possibly, however, a trace of the fact that originally they took by conveyance may be found in the notion that executors take directly from the will even before probate, still repeated as a distinction between executors and administrators [2].

It is now time to consider the position of the *cestui que use*. The situations of the feoffor or donor and of the ultimate beneficiaries were different, and must be treated separately. First, as to the former. In England, as on the Continent, upon the usual feoffment to convey after the feoffor's death, the feoffor remained on the land and took the profits during his life. Feoffors to uses are commonly called pernors of profits in the earliest English statutes and are shown in possession by the earliest cases [3]. As Lord Bacon says in a passage cited above, pernancy of the profits was one of the three points of a use. It was the main point on the part of the feoffor, as to make an estate, or convey as directed, was the main duty on the side of the feoffee. But all the German authorities agree that the pernancy of the profits also made the *gewere*, or protected possession, of early German law [4]. And in this, as in other particulars, the English law gave proof of its origin. In our real actions the mode of alleging seizin was to allege a taking of the esplees or profits [5].

If the remedies of the ancient popular courts had been preserved in England, it may be conjectured that a *cestui que use* in possession would have been protected by the common law [6]. He was not, because at an early date the common law was cut down to that portion of the ancient customs which was enforced in the courts of the King. The recognitions (assizes), which were characteristic of the royal tribunals, were only granted to persons who stood in a

1 Cal. Ch. liv, lv; Beseler, Erbverträgen, i. § 15. p. 261; § 16. pp. 277 et seq.; Heusler, Gewere, pp. 1, 2; Sohm, Eheschliessung, p. 82; Schulte, Lehrb. d. Deutsch. R. u. Rechtsgesch. § 148 (5th ed.), pp. 480 et seq.

2 Annals of Burton (Rolls ed.), 421 (A. D. 1258).

3 *Graysbrook* v. *Fox*, Plowd. 275, 280, 281.

3 Stat. 50 Ed. III. c. 6; 1 R. II. c. 9 ad fin.; 2 R. II. Stat. 2. c. 3; 15 R. II. c. 5; 4 Hen. IV. c. 7; 11 Hen. VI. cc. 3, 5; 1 Hen. VII. c. 1; 19 Hen VII. c. 15; *Rothenhale* v. *Wychingham*, 2 Cal. Ch. iii. (Hen. V.); Y. B. 27 Hen. VIII. 8; Plowden, 352; Litt. §§ 462, 464; Co. Lit. 272 *b*. So 1 Cruise, Dig. Tit. 12. ch. 4. § 9: 'if the trustee be in the actual possession of the estate (which scarce ever happens).'

4 Heusler, Gewere, 51, 52. 59; Brunner, Schwurgerichte, 169, 170; Laband, Vermögensrechtlichen Klagen, 160; 1 Franken, Französ. Pfandrecht, 6.

5 Jackson, Real Actions, 348 and passim. See Statutes last cited, and Stat. 32 Hen. VIII. c. 9. sect. 4.

6 1 Franken, Französ. Pfandr. 6.

feudal relation to the King[1], and to create such a relation by the tenure of land, something more was needed than *de facto* possession or pernancy of profits. In course of time the fact that the new system of remedies did not extend itself to all the rights which were known to the old law became equivalent to a denial of the existence of the rights thus disregarded. The meaning of the word 'seizin' was limited to possession protected by the assizes[2], and a possession which was not protected by them was not protected at all. It will be remembered, however, that a series of statutes more and more likened the pernancy of the profits to a legal estate in respect of liability and power, until at last the statute of Henry VIII. brought back uses to the courts of common law[3].

It is not necessary to consider whether the denial of the assizes to a *cestui que use* in possession was peremptory and universal from the beginning, because the feoffor had another protection in the covenants which, in England as on the Continent, it was usual for him to take[4]. For a considerable time the Anglo-Norman law adhered to the ancient Frankish tradition in not distinguishing between contract and title as a ground for specific recovery, and allowed land to be recovered in an action of covenant, so that it would seem that one way or another feoffors were tolerably safe[5].

But *cestuis que use* in remainder were strangers both to the covenant and the possession. There was an obvious difficulty in finding a ground upon which they could compel a conveyance. The ultimate beneficiaries seem to have been as helpless against the salman in the popular courts on the Continent as they were against the feoffee in the Curia Regis. Under these circumstances the Church, which was apt to be the beneficiary in question, lent its aid. Heusler thinks that the early history of these gifts shows that they were fostered by the spiritual power in its own interest, and that they were established in the face of a popular struggle to maintain the ancient rights of heirs in the family property, which was inalienable without their consent[6]. In view of the effort which the

[1] Heusler, Gewere, 126, 423, 424.

[2] Heusler, Gewere, 424.

[3] See Statutes before cited, p. 167, n. 3, and 1 R. III. c. 1; 27 Hen. VIII. c. 10.

[4] E. g. *Rothenhale* v. *Wychingham*, 2 Cal. Ch. iii.

[5] The Common Law, 400. See further, Ll. Gul. I. c. 23; Statutum Walliae, 12 Ed. I, 'Breve de conventione, per quod petuntur aliquando mobilia, aliquando immobilia;' 'Per breve de conventione aliquando petitur liberum tenementum.' Fleta, ii. c. 65. § 12; Y. B. 22 Ed. I. 494, 496, 598, 600; 18 Ed. II. (Maynard), 602, 603; Fitz. Abr. *Covenant*, passim. This effect of covenant was preserved in the case of fines until a recent date; 2 Bl. Comm. 349, 350, and App. iv. § 1. As to a term of years, see Bract. fol. 220 *a*, § 1; Y. B. 20 Ed. I. 254; 47 Ed. III. 24; (cf. 38 Ed. III. 24); F. N. B. 145 M.; *Andrews' Case*, Cro. Eliz. 214; S. C. 2 Leon. 104; and as to chattels, see Y. B. 27 Hen. VIII. 16. As to the later raising of uses by way of covenant, see Y. B. 27 Hen. VIII. 16; Bro. Abr. *Feoffements al Uses*, pl. 16; Dyer, 55 (3); ib. 96 (40); ib. 162 (48); *Sharington* v. *Strotton*, Plowd. 298, 309.

[6] Heusler, Gewere, 479 et seq. See Glanv. vii. c. 9, where the Church is shown to have the settlement of the question whether the will was reasonably made. Cf. ib. c. 1. § 3.

Church kept up for so long a time to assert jurisdiction in all matters of *fidei laesio*, it would seem that a ground for its interference might have been found in the *fiducia* which, as has been said, was of the essence of the relation, and which we find referred to in the earliest bills printed in the Chancery Calendars.

This is conjecture. But it seems clear that on some ground the original forum for devisees was the Ecclesiastical Court. Glanvill states that it belongs to the ecclesiastical courts to pass on the reasonableness of testamentary dispositions[1], and, while he shows that the executor had the King's writ against the heir, gives no hint of any similar right of legatees or devisees against the executor. The Decretals of Gregory disclose that a little later the Church compelled executors to carry out their testator's will[2]. And Bracton says in terms that legatees and devisees of houses in town or of an usufruct could sue in the ecclesiastical courts[3]. As we have seen, in the case of houses in town the executor ceased to intervene, the ecclesiastical remedy against him became superfluous, and devisees obtained a remedy directly against deforciants in the King's courts. But with regard to legacies, although after a time the Chancery became a competing, and finally, by St. 20 & 21 Vict. c. 77, s. 23, the exclusive jurisdiction, as late as James I. 'the Lord Chancellor Egerton would say, the ecclesiastical courts were proper for legacies and sometimes send them thither[4].'

These courts were unable to deal with uses in the fulness of their later development. But the chief instances of feoffment upon trust, other than to the uses of a lost will or for distribution after death, of which there is any record until sometime after the Chancery had become a separate court under Edward III. were for the various fraudulent purposes detailed in the successive petitions and statutes which have come down to us[5]. It should be mentioned too, that there are some traces of an attempt by *cestuis que use* who were strangers to the feoffment to enforce the trust by way of a condition in their favour, and it seems to have been put that way sometimes in the conveyances[6].

For a considerable time, then, it would seem that both feoffors and other *cestuis que use* were well enough protected. The first

[1] Glanv. vii. c. 6 & 8.
[2] Decret. Greg. III. Tit. 26. cap. 19. A. D. 1235.
[3] Bract. fol. 407 *b*, 61 *a*, *b*.
[4] *Nurse* v. *Bormes*, Choyce Cases in Ch. 48. See further *Glen* v. *Webster*, 2 Lee, 31. As to common law, see *Deeks* v. *Strutt*, 5 T. R. 690; *Atkins* v. *Hill*, Cowper, 284, and cases cited.
[5] Petition of Barons, c. 25 (Hen. III. A. D. 1258), Annals of Burton (Rolls ed.), 422; id. Stubbs, Select Charters; Irish Stat. of Kilkenny, 3 Ed. II. c. 4; Stat. 50 Ed. III. c. 6; 1 R. II. c. 9; 2 R. II. Stat. 2, c. 3; 7 R. II. c. 12; 15 R. II. c. 5; 4 Hen. IV. c. 7. See also Statute of Marlebridge, 52 Hen. III. c. 6.
[6] 2 Rot. Parl. 79 (3 R. II. nos. 24, 25); ib. 60, 61 (2 R. II. nos. 25, 26).

complaint we hear is under Henry IV. It is of the want of a remedy when property is conveyed by way of *affiance* to perform the will of the grantors and feoffors and the feoffees make wrongful conveyances[1]. As soon as the need was felt, the means of supplying it was at hand. Nothing was easier than for the ecclesiastics who presided in Chancery to carry out there, as secular judges, the principles which their predecessors had striven to enforce in their own tribunals under the rival authority of the Church. As Chancellors they were free from those restrictions which confined them as churchmen to suits concerning matrimony and wills. Under Henry V. we find that *cestuis que use* had begun to resort to equity[2], whereas under Richard II. the executors and feoffees of Edward III. had brought their bill for instructions before the Judges in Parliament[3]. In the next reign (Henry VI.) bills by *cestuis que use* become common. The foundation of the claim is the *fides*, the trust reposed and the obligation of good faith, and that circumstance remains as a mark at once of the Teutonic source of the right and the ecclesiastical origin of the jurisdiction.

If the foregoing argument is sound, it will be seen that the doctrine of uses is as little the creation of the subpoena, or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilization which the common law was too archaic to deal with. It is true, however, that the form of the remedy reacted powerfully upon the conception of the right. When the executor ceased to intervene between testator and devisee the connection between devises and uses was lost sight of. And the common law courts having refused to protect even actual pernors of profits, as has been explained, the only place where uses were recognized by that name was the Chancery. Then, by an identification of substantive and remedial rights familiar to students, a use came to be regarded as merely a right to a subpoena. It lost all character of a *jus in rem*, and passed into the category of choses in action[4]. I have shown elsewhere the effect of this view in hampering the transfer of either the benefit or burden of uses and trusts[5].

[1] 3 Rot. Parl. 511 (4 Hen. IV. no. 112. A.D. 1402).
[2] *Dodd* v. *Browning*, 1 Cal. Ch. xiii; *Rothenhale* v. *Wychingham*, 2 Cal. Ch. iii.
[3] 2 Rot. Parl. 60, 61 (2 R. II. nos. 25, 26).
[4] Co. Lit. 272 *b*; Bacon, Reading on Stat. of Uses, Works (ed. Spedding), vii. p. 398.
[5] The Common Law, ch. xi; see especially pp. 390, 407–409, and, in addition to the books cited on p. 408, notes 1 and 2, Fitz. Abr. *Subpœna*, pl. 22; *Dalamere* v. *Barnard*, Plowden, 346, 352; *Pawlett* v. *Attorney-General*, Hardres, 465, 469; Co. Lit. 272 *b*; W. Jones, 127.

II. *Contract.*

I must now say a few words of the only other substantive doctrine of which I have discovered any trace in the first period of English Equity. This is a view of Contract, singularly contradicting the popular notion that the common law borrowed Consideration from the Chancery. The requirements of consideration in all parol contracts is simply a modified generalization of the requirements of *quid pro quo* to raise a debt by parol. The latter, in certain cases at least, is very ancient, and seems to be continuous with the similar doctrine of the early Norman and other continental sources which have been much discussed in Germany[1].

I may remark by way of parenthesis that this requirement did not extend to the case of a surety, who obviously did not receive a *quid pro quo* in the sense of the older books and yet could bind himself by parol from the time of the Somma to Edward III. and even later where the custom of various cities kept up the ancient law[2]. Sohm has collected evidence that suretyship was a formal contract in the time of the folk laws, in aid of his theory that the early law knew only two contracts; the real, springing from sale or barter and requiring a *quid pro quo;* and the formal, developed from the real at an early date by a process which has been variously figured[3]. I do not attempt to weigh the evidence of the continental sources, but

[1] Somma, ii. c. 26, §§ 2, 3, in 7 Ludewig, Rel'q. Manuscript. pp. 313, 314; Grand Coustumier, c. 88 & 90; Statutum Walliae, 12 Ed. I: 'Si vero Debitor venerit, necesse habet Actor exprimere petitionem, et rationem sue petitionis, videlicet, quod tenetur ei in centum marcis, quas sibi accommodavit, cujus solutionis dies preteriit, vel pro terra, vel pro equo, vel pro aliis rebus seu catallis quibuscunque sibi venditis, vel pro arreragiis redditus non provenientis de tenementis, vel de aliis contractibus,' &c. Y. B. 39 Ed. III. 17, 18, 'issint il est *quid pro quo*;' 3 Hen. VI. 36. pl. 33; 7 Hen. VI. 1. pl. 3; 9 Hen. VI. 52. pl. 35; 11 Hen. VI. 35. pl. 30 at fol. 38; 37 Hen. VI. 8. pl. 18. See also 'Justa debendi causa' in Glanv. x. c. 3; Dial. de Scacc. ii. c. 1 & 9; Fitz. Abr. *Dett*, pl. 139; Y. B. 43 Ed. III. 11. pl. 1. Form of Count given by 1 Britton (ed. Nichols), 161, 162. pl. 12; Y. B. 20 & 21 Ed. I. App. 488, 'Marchandise' ground of debt. Sohm, Eheschliessung, p. 24; 1 Franken, Französ. Pfandr. § 4. p. 43; Schulte, Reichs- u. Rechtsgesch. § 156 (4th ed.), p. 497. Consideration is first mentioned in equity in 31 Hen. VI., Fitz. Abr. *Subpena*, pl. 23; Y. B. 37 Hen. VI. 13. pl. 3, and by the name *quid pro quo*. So in substance as to assumpsit; Y. B. 3 Hen. VI. 36. pl. 33.

The interpretation of Fleta, ii. c. 60. § 25 by the present writer in The Common Law, 266, is rightly criticised in Pollock, Contr. (3rd ed.), 266, as appears by comparing the more guarded language of Bracton, 15 *b*.

[2] Somma, i. c. 62, ii. c. 24; 7 Ludewig, 264, 309; Grand Coustum. c. 89 (cf. Bract. fol. 149 *b*, § 6); The Common Law, 260, 264. See, beside authorities there cited, F. N. B. 122 K; ib. I in marg., 137 C; Y. B. 43 Ed. III. 11. pl. 1; 9 Hen. V. 14. pl. 23. Car. M. Cap. Langob. A. D. 813. c. 12, 'Si quis pro alterius debito se pecuniam suam promiserit redditurum in ipsa promissione est retinendus,' cited Löning, Vertragsbruch, 62, n. 1.

In 2 Gesta Hen. II. (Ben. Abbas, Rolls ed.), 136, sureties make oath to surrender themselves if the agreement is broken. Sohm, Eheschliessung, 48, goes so far as to argue that the oath was simply one substituted for the Salic formal contract. But I find no evidence that the oath was necessary in England, unless for ecclesiastical jurisdiction. 2 Gesta Hen. II. p. 137.

[3] See, e. g., 1 Franken, Französ. Pfandr. § 16. pp. 209-216; § 18. pp. 241 et seq.; ib. 261-266.

in view of the clear descent of suretyship from the giving of hostages, and the fact that it appears as a formless contract in the early Norman and Anglo-Norman Law, I find it hard to believe that it owed its origin to form any more than to *quid pro quo*. Tacitus says that the Germans would gamble their personal liberty and pay with their persons if they lost[1]. The analogy seems to me suggestive. I know no warrant for supposing that the *festuca* was necessary to a bet.

I go one step further, and venture hesitatingly to suggest that cases which would now be generalized as contract may have arisen independently of each other from different sources, and have persisted side by side for a long time before the need of generalization was felt or they were perceived to tend to establish inconsistent principles. Out of barter and sale grew the real contract, and if the principle of that transaction was to be declared universal, every contract would need a *quid pro quo*. Out of the giving of hostages, familiar in Cæsar's time, grew the guaranty of another's obligation, and if this was to furnish the governing analogy, every promise purporting to be seriously made would bind. But the two familiar contracts kept along together very peaceably until logic, that great destroyer of tradition, pushed suretyship into the domain of covenant, and the more frequent and important real contract succeeded in dividing the realm of debt with instruments under seal[2].

To return to Equity. In the Diversity of Courts (*Chancery*) it is said that 'a man shall have remedy in Chancery for covenants made without specialty, if the party have sufficient witness to prove the covenants, and yet he is without remedy at the common law.' This was in 1525, under Henry VIII., and soon afterwards the contrary was decided[3]. But the fact that a decision was necessary confirms the testimony of the passage quoted as to what had been the tradition of the Chancery. I do not propose to consider whether thus broadly stated it corresponded to any doctrine of early law, or whether any other cases could be found, beside that of the surety, in which a man could bind himself by simply saying that he was bound. For although the meaning of the tradition had been lost in the time of Henry VIII. when the text-book spoke of covenants generally, the promise with which Equity had dealt

[1] Germ. 24.

[2] Y. B. 18 Ed. III. 13. pl. 7; 44 Ed III. 21. pl. 23; 43 Ed. III. 11. pl. 1. So warranty, which had been merely an incident of a sale (Lex Salica, c. 47; Glanv. x. c. 15 & 17), came to be looked at as a covenant, Y. B. 44 Ed. III. 27. pl. 1; and at a later date bailment was translated into contract. By way of further illustration, I may add that in modern times Consideration has still been dealt with by way of enumeration (see e. g. 2 Bl. Comm. 444; 1 Tidd's Practice, ch. 1, as to assumpsit), and only very recently has been resolved into a detriment to the promisee, in all cases.

[3] Cary, Rep. in Ch. 5; Choyce Cases in Ch. 42.

was a promise *per fidem*. Thus, under Edward IV.[1], a subpoena was sued in the Chancery alleging that the defendant had made the plaintiff the procurator of his benefice and promised him *per fidem* to hold him harmless for the occupation, and then showing a breach. The Chancellor (Stillington) said that 'in that he is damaged by the non-performance of the promise he shall have his remedy here.' And to go back to the period to which this article is devoted, we find in the reign of Richard II. a bill brought upon a promise to grant the reversion of certain lands to the plaintiff, setting forth that the plaintiff had come to London and spent money relying upon the *affiance* of the defendant, and that as he had no specialty, and nothing in writing of the aforesaid covenant, he had no action at the common law. This is all the direct evidence, but slight as it is, it is sufficient to prove an ancient genealogy, as I shall try to show.

Two centuries after the Conquest there were three well-known ways of making a binding promise; Faith, Oath, and Writing[2]. The plighting of one's faith or troth here mentioned has been shown by Sohm and others to be a descendant of the Salic *Fides facta*, and I do not repeat their arguments[3]. It still survives in that repertory of antiquities the marriage ceremony, and is often mentioned in the old books[4].

Whether this plighting of faith (*fides data, fides facta*) was a formal contract or not in the time of the Plantagenets, and whether or not it was ever proceeded upon in the King's courts, it sufficiently appears from Glanvill and Bracton that the royal remedies were only conceded *de gratia* if ever[5]. The royal remedies were afforded at first only by way of privilege and exception, and, as I have already shown, never extended to all the ancient customs which prevailed in the popular tribunals. But if the King failed the Church stood ready. For a long time, and with varying success, it

[1] Y. B. 9 Ed. IV. 4. pl. 11; Fitz. Abr. *Subpena*, pl. 7.

[2] Compare Letter of Gregory IX. to Henry III., Jan. 10, 1233, in 1 Royal Letters, Henry III. (Rolls ed.), p. 551, 'Possessiones ... fide ac juramentis a te praestitis de non revocandis eisdem, sub litterarum tuarum testimoniis concessisti,' with Sententia Rudolfi Regis, A. D. 1277, Pertz, Monumenta, Leges ii. p. 412; 'Quaesivimus ... utrum is qui se datione fidei vel juramento corporaliter prestito, vel patentibus suis litteris, ad obstagium vel solutionem alicujus debiti ad certum terminum obligavit, nec in ipso termino adimplevit ad quod taliter se adstrinxit de jure posset ... per iudicium occupari? Et promulgatum extitit communiter ab omnibus, quod is, qui modo predicto ... promisso non paruit, valeat, ubicumque inveniatur, auctoritate iudiciaria conveniri.'

[3] Lex Salica (Merkel), c. 50; Lex Ripuaria, c. 58 (60). § 21; Sohm, Eheschliessung, 48, 49, notes; 1 Franken, Französ. Pfandr. 264 n. 2.

[4] Eadmer (Rolls ed.), 7, 8, 25; Dial. de Scacc. ii. c. 19; 2 Gesta Hen. II. (Ben. Abbas), 134-137; 3 Roger Hoved. (Rolls ed.), 145; Glanv. vii. c. 18; x. c. 12; 1 Royal Letters, Henry III. (Rolls ed.), 308; Bract. 179 *b*. Cf. id. 175 *a*, 406 *b*, &c.; Reg. Majest. ii. c. 48. § 10; c. 57. § 10; Abbrev. Plac. 31. col. 1 (2 Joh. Norf. rot. 21); 22 Ass. pl. 70. fol. 101.

[5] Glanv. x. c. 8; Bract. 100 *a*.

claimed a general jurisdiction in case of *laesio fidei*[1]. Whatever the limit of this vague and dangerous claim it clearly extended to breach of *fides data*. And even after the Church had been finally cut down to marriages and wills, as shown in the last note, it retained jurisdiction over contracts incident to such matters for breach of faith, and, it seems, might proceed by way of spiritual censure and penance even in other cases[2].

Thus the old contracts lingered along into the reign of Edward III. until the common law had attained a tolerably definite theory which excluded them on substantive grounds, and the Chancery had become a separate Court. The clerical Chancellors seem for a time to have asserted successfully in a different tribunal the power of which they had been shorn as ecclesiastics, to enforce contracts for which the ordinary King's Courts afforded no remedy. But, I think, I have now proved that in so doing they were not making reforms or introducing new doctrines, but were simply retaining some relics of ancient custom which had been dropped by the common law, but had been kept alive by the Church.

O. W. Holmes, Jun.

[1] The fluctuations of the struggle may be traced in the following passages: 'Item generaliter omnes de fidei laesione vel juramenti transgressione quaestiones in foro ecclesiastico tractabantur.' A. D. 1190. 2 Diceto (Rolls ed.), 87; 2 Matt. Paris, Chron. Maj. (Rolls ed.), 368. 'Placita de debitis quae fide interposita debentur vel absque interpositione fidei sint in justitia Regis.' Const. Clarend. c. 15; Glanv. x. c. 12; Letter of Thomas a Becket to the Pope, A. D. 1167, 1 Rog. Hoved. (Rolls ed.), 254. Agreement between Richard and the Norman clergy in 1190, Diceto and Matt. Par. ubi supra. As to suits for breach of faith, outside of debts, in the Courts Christian, circa 1200, Abbrev. Plac. 31. col. 1 (2 Joh.), Norf. rot. 21. 'Prohibetur ecclesiasticus judex tractare omnes causas contra laicos, nisi sint de matrimonio vel testamento.' A. D. 1247, 4 Matt. Paris (Rolls ed.), 614. Resistance to this, Annals of Burton (Rolls ed.), 417. 423; cf. ib. 256. But this prohibition fixed the boundaries of ecclesiastical jurisdiction.

[2] 22 Lib. Ass. pl. 70. fol. 101. Cf. Glanv. vii. c. 18, 'propter mutuam affidationem quae fieri solet.' Bract. fol. 175 *a*. 406 *b*, 407, 412 *b*; Y. B. 38 Hen. VI. 29. pl. 11. But covenant was the only remedy if the contract had been put in writing; Y. B. 45 Ed. III. 24. pl. 30.

ON LAND TENURE IN SCOTLAND AND ENGLAND.

I.

I PROPOSE to compare and contrast some salient points in the land rights of England and Scotland. In doing so I shall assume an acquaintance on the part of the reader with the leading features of English land rights; and indicate the traits of Scotch tenure by showing what they have in common with and wherein they differ from these.

It is commonly supposed by legal practitioners that the systems of Scotch and English land laws are utterly foreign to each other. The Scotch lawyer, on first acquaintance with an English abstract of title, looks upon it as bewildering, and at best showing very questionable evidence of security. The English conveyancer finds in the Scotch deeds a mass of technicalities which are unintelligible, and straightway hands over the bundle of original documents for the perusal of a Scotch lawyer. Each would be hardly prepared to learn that the principles of tenure and title in the two countries are radically identical; still less to be told that his first impression is due to his own want of thorough and historical knowledge of the one system with which he professes to be conversant.

Yet the systems are fundamentally the same, and every point of divergence has an ascertainable history. I am not speaking of the archaic identity of usages which are recognised as having prevailed in most countries where ancient communities of plough cultivators have settled on the land. These, for causes to which I shall hereafter advert, have, in Scotland, left few marks upon the actual tenancies of the present day; although they are strongly traced in still extant rentals, and in the descriptions of land in recorded titles. In such documents the expressions 'ploughland,' 'oxgate,' 'husbandland,' 'carucate' are familiar, and their relations to the taxation known as the 'old extent' are clearly marked. The more mysterious 'davach' of the north-eastern counties of Scotland may yet afford material for the curious enquirer. Professor Innes[1] identifies the area as equal to four ploughlands—as much as four ploughs (of eight oxen each) could till in a year—each ploughland being equal to eight oxgates (about thirteen acres each), and to a forty-shilling land of 'old extent.' The 'davach' specially belongs

[1] Scotch Legal Antiquities, pp. 272–285.

to the fertile district drained by the rivers falling into the Moray Firth, a region fit for the poet's description of the ancient Tibur—*Argeo positum colono ... Ver ubi longum tepidasque praebet Jupiter brumas.* Such a region may well be imagined to have been the seat of a very early colony of plough-cultivators; and it is tempting to guess at the derivation as suggesting whence they came. Mr. Skene guesses at a Celtic one, but Professor Innes, more cautious, gives up the derivation in despair.

Such fascinating speculations are however beyond the scope of this essay, which is to treat of the identity and divergence of Scotch and English tenures as a matter of recent history, and to show that some acquaintance with each system is valuable for the lawyer, and still more for the legislator, who desires an intelligent and thorough knowledge of either. It would be easy to show, for instance, that an English lawyer who was familiar with the leading features of a Scotch title would not have committed the blunder made by the authors of the Vendor and Purchaser Act, 1874, by the 7th section of which (until rescinded the following year) the security given by the *legal estate* was imperilled. He would have known that the 'legal estate' of English law is bound up with the 'seizin'—a fundamental conception of the feudal system which is the common source of the land tenures of both countries; and would have seen clearly how to get rid of certain anomalies of English law without interfering with this radical notion. Again, an English lawyer, looking by way of contrast at the Scotch law, will learn to appreciate the rule of his own law that possession is evidence of seizin in fee, and the principle of prescription (practically absent from Scotch law), by which possession may mature into title. On the other hand, Scotch law is much indebted for recent improvements to the contrast afforded by the modern English system. It is not long since a Scotch Lord-Advocate who presumably had acquired some knowledge of English law—for he was called to the English bar—obtained the passing of a very useful Act[1] by which some of the obvious mischiefs of the unmitigated feudal law up to that time prevailing in Scotland were abolished, without interfering with the use of the feudal machinery as a convenient means of creating and recording perpetual holdings of land.

To show the intimate connection between the two countries which for a time induced a similarity in administrative machinery, and almost an identity of land laws, it is necessary to recall some points of early Scotch history, which may not be familiar to the

[1] Conveyancing Act (Scotland), 1874.

recollection of every English reader. The period of closest relations begins with the immigration of English who accompanied the expedition of Malcolm Canmore against Macbeda in 1054. This *Macbeda*—adopting the spelling used by Mr. Hill Burton to mark a person whom the scanty records of contemporaneous history present in a very different light from the *Macbeth* so well known to us—was Maarmor of Ross, the independent ruler of a district stretching westwards from the Moray Firth. King Duncan, when on the territory of the Maarmor with aggressive designs, met his death at the hands of Macbeda, who—in right (apparently) of his wife, the granddaughter of a former King of Scotland—ascended the Scotch throne. There is nothing to show that Macbeda's succession, in preference to Duncan's son, who was a minor, was not in accordance with the usage of the time. Nor is it surprising that the boy Malcolm, growing up among his English cousins, should be taught a different theory, and should, when he arrived at maturity, with the aid of these relatives, proceed to enforce his claim to the Scotch crown.

The expedition set out in 1054, and engaged the forces of Macbeda at Dunsinnan. This battle was not decisive. Macbeda retreated in the direction of the country originally held by him as Maarmor of Ross, and was killed at Lumphanan in Aberdeenshire. Nor did the contest end here. Two years elapsed between the setting out of the expedition and the final success of Malcolm; and the English who had aided him in this protracted struggle were doubtless conveniently rewarded with grants of the earldoms and lands of the losing faction. This seems to explain the undoubted fact that in all the early extant Scotch charters—of which there are numerous specimens of David I (1124-1153)—the names of grantees and witnesses, even in the case of lands so far north as the district of Moray, are invariably either Norman or English. Another important effect of the success of Malcolm was to settle the rule of succession of the crown; so far, at all events, that a son, though minor, must succeed in preference to a collateral. The feudal rule of primogeniture became established in the succession of Malcolm's sons, and this doubtless influenced the rule of succession in lands held by charter from the king, as well as in those held of subjects.

The Norman conquest of England sent a stream of new emigrants into Scotland. Amongst these arrived (in 1068) Edgar the Ætheling, the heir of the Saxon line of kings, with his mother and sisters, one of whom, Margaret, was afterwards married to Malcolm. By this marriage there were three sons, Edgar, Alexander, and David, each of whom eventually, in succession, ascended the throne of Scotland;

and a daughter, Matilda, who afterwards became the wife of Henry I, King of England.

Malcolm reigned for forty-six years during which Scotland seems to have enjoyed a period of internal quiet. There was fighting with England, carried on for the most part within the English border; and it was in one of these expeditions that Malcolm lost his life. Tradition, and a rude cross still point out the spot, near Alnwick Castle, where he fell (1093). After his death, Scotland seems to have become hot for the English settlers; and Edgar had to fight his way to the throne, again with the help of English. Edgar died in 1107, leaving it as a bequest or injunction to his brother Alexander who succeeded him, that the border province of Cumbria should be ruled by their younger brother David.

The consequence was that David, in his earlier years, and before succeeding, as he ultimately did, to the throne of Scotland, became bound by intimate relations with Normans both as neighbours and as his own feudal dependants. He married Matilda, heiress of Waltheof Earl of Northumberland, and in her right succeeded to this earldom in 1108. Much of his time was spent about the English Court. He succeeded his brother Alexander as King of Scotland in 1124. He was hardly established on the throne when the irrepressible Maarmor of Ross had to be reckoned with. The insurrection, or invasion, was suppressed with the aid of Norman adventurers, and again we find the possessions in the Maarmor's territory parcelled out amongst these strangers. Throughout Scotland indeed we find a large proportion of the Crown vassals with Norman names.

During the reign of David in Scotland, commenced the unsettled condition of England due to the contest for the succession on the death of Henry I. David supported the cause of his niece, Henry's daughter Matilda, against Stephen. He appears at the head of an invading army, a motley host of Scots, English, and *French* (or Normans), men of Galloway (perhaps of Pictish race), and men of Norwegian or Danish race from the Orkneys. This heterogeneous army was engaged by the forces of Stephen, consisting of a compact Norman phalanx. The ensuing fight described as taking place 'ad Standardam,' enlivens the page of history with the enthusiastic description of an eyewitness. The compact phalanx of Normans were victorious, but the more numerous army from Scotland were strong enough to be troublesome, and the expedition ended in a treaty not unfavourable to the Scotch King. The moral effect of the battle must have been all in favour of the Normans, and probably went far to repress any manifestation of the chronic feeling of resentment against these strangers, of which we from time

to time see the traces in Scotland. In Galloway however (a country where the King's writ ran with difficulty) this resentment took an acute form; and from this time Norman names become conspicuously scarce there.

In Scotch annals, David I. maintained the character of a victorious and successful Prince. The power of the Maarmor seems to have been quelled for a time, and doubtless this had its effect in maintaining the quiescence of the Central and Western Highlands. And as David's military operations were mostly carried on in the outskirts of or beyond the limits of his dominions, it is probable that the country generally enjoyed a fair measure of substantial prosperity. The foundation and endowment of the monasteries, which was characteristic of this reign, doubtless gave a stimulus to cultivation by free tenants under the auspices of these kindly landlords. The feature of the reign however to which I now call attention, is that the English (Normans or Saxons) became widely established on the land as a military caste. This probably did not at once interfere with the cultivation and mode of holding of the actual occupiers; but the way was prepared for the introduction of the feudal tenures which had already grown into a system on the Continent of Europe, and had become, through the Norman Conquest, widely prevalent in England. The Crown charters of this reign, however, still retain the short and simple forms of Saxon rather than Norman grants.

David I. died at Carlisle in 1153, and next to him reigned in succession his two sons, Malcolm the Maiden, and William the Lion. The great political event of this last-mentioned reign was the capture by the English, in 1174, of the Scottish King; and his ransom on the terms of acknowledging the complete feudal superiority of the King of England over the kingdom of Scotland. The transaction is recorded in a document which has been considered a triumph of skill in feudal draftsmanship. The concession was not however destined to be lasting, even on parchment. On the accession of Richard Cœur de Lion to the English throne, one of his first acts was to discharge *simpliciter* the obligation so extorted.

William the Lion was succeeded in 1214 by his son Alexander II, then a youth of seventeen. In the early part of this reign we hear of fighting on the English border, but diplomacy steps in and a joint Commission to settle the marches of the two kingdoms had a good effect in promoting peace in this quarter. There was however again trouble in Moray with a representative of the Maarmors, and with the Celts in the Western and Central Highlands. Alexander continued with success the policy of planting Norman adventurers

upon the land of these unsettled districts. In the latter part of this reign we find mention of the muster of a large force in defence of the country against the army of King Henry III. The demonstration on both sides however passed without actual fighting; and the two Kings came to an agreement in the 'treaty of Newcastle,' by one term of which the young prince Alexander was to become the husband of Henry's daughter Margaret.

The reign of Alexander II. closes with an expedition made by him to enforce the acknowledgment of feudal supremacy from the practically independent ruler of Argyle and the Isles. He died (in 1249) on the small Island of Kerrera opposite Oban. At his death his son, who succeeded as Alexander III, was about eight years of age.

The Coronation of Alexander III. is said to have taken place with great ceremony; and shortly afterwards the marriage between the children pursuant to the treaty of Newcastle was celebrated at York. The time of the young King's minority is filled with intrigues amongst the powerful Norman barons related collaterally to the late King. In 1260 was born of the Royal marriage a daughter, Margaret. A few years later followed the great event of this reign; a brief and final contest with the Norsemen under King Haco, who brought a fleet, with a powerful force, for the invasion of Scotland. The Armada was anchored in the broad sea-way between the Ayrshire coast and the Isle of Arran. The weather was stormy and the ships suffered considerable damage. A skirmish on the coast at Largs was followed by the descent of the main army, who were totally defeated by a hastily collected force on the Scotch side. The remnant of the fleet made its way back, not without further losses, to Orkney, where Haco died in 1263. The result of this unsuccessful invasion was to consolidate the power of the Scotch King over the Highlands and Western Islands. The rights of Norway over the Islands were formally ceded in 1266.

Soon after the battle of Largs a son had been born to the Scotch King. His daughter, Margaret, was, in 1281, married to Eric of Norway; and thus was established a bond of amity between the Kings of Norway and Scotland. Shortly afterwards the son of the Scotch King was married to a daughter of the Earl of Flanders.

It now seemed as if Scotland was destined to enter on a course of continued prosperity and stable government. Even were it suspected that Edward, now on the throne of England, was already contriving the means of fortifying the old shadowy claim to feudal superiority, this could hardly have been perceived as a cloud upon the horizon. The prospect was quickly changed, in

1283, by the death of the Princess, leaving a newly-born daughter, followed in a few months by the death of the King's only son. The grounds for anxiety are pithily stated by Mr. Hill Burton[1]. Apart from the claims of the infant heiress, which, according to the precedents of the time, were not free from doubt, 'it was known that there were several expectants of the succession, but they were all distant collaterals. What was far more serious, however, they were all Norman barons with possessions in England as well as in Scotland. There was no doubt, although Norman names are so conspicuous in great State transactions in Scotland, that there was a strong middle class, backed by a peasant and burgher class, who disliked the Norman intruders, and felt a horror of any subjection to a Norman government such as England had now been suffering under for two hundred years. To them it appeared that Scotland was drifting towards such a fate, with nothing at present existing but the frail child away in Norway to protect them. Whether it should be the English King himself, or one of those Norman magnates surrounding his throne, that was to rule, would make little matter; it would still be Norman rule.' The Estates promptly met at Scone, and resolved that, saving the event of a posthumous child being born to the late Prince, the succession should devolve on the Princess of Norway.

On the 12th of March, 1286, long remembered as the darkest day in Scotland's annals, Alexander III. was killed by a fall from his horse. In 1290 the Princess, Maid of Norway, died at Orkney—on the way to Scotland; and the country was committed to a disputed succession, to be followed by the intervention of Edward, the temporary subjugation of Scotland, and the War of Independence; an ordeal from which the Scottish kingdom and people emerged victorious and independent, but with a land peeled and well-nigh desert.

The above brief outline of a period which, by way of contrast, is designated in the formal style of inquests of heirship of the following century as *tempore pacis*[2], will suffice to show the intimate

[1] Hist. of Scotland, vol. ii. p. 116.

[2] Inquisitio generalis (temp. Robert II.); Registrum brevium in the Bute MS. Nos 51 and 53. One head of the inquiry is: 'Et quantum valent dictae terrae annui redditus cum pertinentibus per annum et quantum valuerunt *tempore pacis*.' This style was continued up to recent times in the heads of the *Inquest* or *Brieve of Service*; and the expression 'tempore pacis' has been a puzzle to the Institutional Writers. Sir Thomas Craig (*Jus Feudale*, ii. 17. 36) says that the meaning has often been in controversy among very learned persons, none of whom have satisfactorily explained it. He hazards an explanation of his own, to the effect that it refers to the time of our ancestors, 'qui nunc in pace sunt'! Lord Stair (iii. 5. 38) makes a better guess, but he is evidently at sea. When once we know that the style of writ dates back to the time of Robert II. and may possibly have been settled still earlier), the explanation becomes simple: and we also see the reason why the inquiry was answered by reference to the 'old extent'

relations then held by Scotland towards England, both in the persons of the reigning families, and in the immediate tenure-holders under the Crown. That the Norman tenure-holders should be closely followed by the feudal lawyer is consistent with what we know of the constitution of feudal tenures throughout Europe. Already the tenure of the great estates, in both countries, was regulated by feudal principles. Probably in Scotland as well as in England, in the tenure of small estates, these principles struggled with and often gave way to local usages. The gradual modelling of all estates in Scotland, large and small, on the feudal type, was the work of a later period.

Throughout Europe, an invariable mark of the feudal tenure was the formal 'Investiture;' and this must, within the period here spoken of, have become of general use in Scotland[1]. The late survival of this ancient formality is one of the curiosities of Scotch law. A graphic description of the ceremony in its latest days has been placed on record by one who, while having as an apprentice of the law occasionally taken part in it, was capable of fully appreciating the significance of its details. The pecuniary transaction being concluded, and the feu-charter signed, the Investiture follows:—'A small group of men appear on the ground itself. One takes from his pocket the actual feu-charter; he is the attorney or representative of the purchaser or vassal. He hands it to another, and desires him to read from it the precept of sasine, or the direction which the superior therein gives for giving his new vassal seisin or absolute possession of the land. The receiver of this document — who, like the giver of it, is probably a clerk in the office where the business is transacted— represents the bailie, bailiff, or executive officer of the superior's seignorial court. He receives the precept of his lord and master with due reverence and obedience. Giving effect to its directions, he would stoop down, and, lifting a stone and a handful of earth, hand these over to the new vassal's attorney, thereby conferring on him "real, actual, and corporeal possession" of the fief. The next duty of the purchaser's attorney was what was termed to "take instruments," to enter a solemn protest that his client's infeftment, infeofment, or placing in the fief, was completed, and this he did by handing a piece of money—the canonical sum was a shilling—to a notary public in attendance. This was not the

(the valuation made in the time of Alexander III.), the amount of which, in later times, was proved by the *retour* (the return made by the sheriff) to a former writ of inquiry.

[1] Stair (Inst. iv. 3. 4), on the authority of Craig (ii. 2. 18), says that instruments of sasine were introduced by James I (of Scotland), on his return from captivity in England. This theory, in itself incredible, is disposed of by Erskine, a much better authority on points of historical law, who says (Inst. iii. 3. 34) that many instruments of sasine much older were extant in his days.

least significant part of the ceremony, as bearing it back into the furthest recesses of the feudal system, when it acted in conjunction with the imperial. The Empire left to its spiritual half the functions of the scribe with the preservation of records. To carry out this function, certified notaries were distributed over Christendom, and divided into districts according to the organisation of the Church. The gentleman who receives the shilling in this instance is a Notary Public of the Holy Roman Empire. His doquet or recorded notandum of the proceedings is written in the language of Rome, and in a country where the establishment is Presbyterian, and the ecclesiastical division is into presbyteries and synods, he designs himself according to the episcopal diocese of the old Romish Church for which he is licensed, as *Diocesis Moraviensis*, or *Diocesis Andreanopolitani, notarius publicus*. We shall find afterwards, at the outbreak of the war of independence, that when Edward I. professed to take possession of Scotland as lord paramount, in order that he might give the crown to the true heir, the facts of the transaction were attested exactly in the same manner by a Notary Public of the Holy Roman Empire[1].' To complete the picture, we must imagine the presence of the young writer's apprentice, and future historian of Scotland—a quaint figure even then — released from the drudgery of office-work for an hour in the open air. He assists, not without a sense of the humour of the transaction, in gravely employing for the transfer of a patch of land for a suburban villa the formalities used in medieval Europe for asserting the title to a kingdom; and sees in the barefooted urchins whom the oddity of the ceremony has attracted to the spot, the *Pares Curiae*—the parliament of vassals attached to the old seignorial court—who take a part in the investiture, as witnessing the rights conferred on the new vassal and consenting to receive him into their community.

The form of the feu-charter, which, as we have seen, in the time of David I. emulates the brevity of the grants of Saxon kings, did not all at once attain the elaborate form of later times. The various rights detailed in the *tenendas* clause of later charters were left to be implied from the existing customs whatever they were. The Norman landholders were still accounted strangers and guests, and did not yet venture to rivet the chains of their tenures too tightly. We do not find extant the original of any grant of this period expressly erecting lands 'in baroniam,' nor *tenendas* 'cum fossâ et furcâ'—'pit and gallows.' Yet, whether by the express terms of the charter or by the custom of already existing manors, these

[1] Burton, Hist. of Scotland, vol. i. p. 397, note. The ceremony of infeftment on the lands was abolished, and a simple entry in the Register of Sasines substituted for it, by Act of Parliament in 1847.

regalia of the feudal baron are declared on high authority to have been included in a grant of William the Lion. A papal bull of the year 1182[1] confirms the rights of the monks of Arbroath. Besides the manorial franchises of *soc sac thol them* and *infangthief* (usual incidents to both English and Scotch manors) the monks are declared to hold their lands 'cum furcâ et fossâ,' and likewise to have '*examen aquae, ferri calidi et duelli*;' a form adapted to the religious character of the grantees. It seems probable, however, that the concession of the powers of pit and gallows in the hands of barons was not usual at the time here spoken of. It was in the later and darker times of baronial tyranny that they became common as appurtenances to a tenure of land[2].

In the time of the Alexanders, the powers of the Crown were doubtless sufficient to supersede criminal jurisdiction, involving life and limb, at the hands of the barons. Two justiciars, one for Scotland proper (i.e. north of Forth) and the other for Lothian and the country south of Forth, were the great ministers of justice; and the sheriffs and crowners exercised a provincial authority circumscribed by law, or by their special commissions from the King or his justiciar. Already there are signs of a tendency to grant to the sheriffs or crowners charters of their offices. It does not appear that any popular claim of right prevented these officers from holding pleas of the Crown; but the Crown in regard to such pleas reserved the privilege and profits of fine and pardon.

In the administration of civil justice it is probable that, even at this early time, as was certainly the case not much later, forms were more elastic in Scotland than in England. Provided the defendants were 'summoned' in due form of law to answer to a complaint, the 'debaitable matter whereanent' might be set forth without strict regard to a precedent already sanctioned. But the English forms of writs (or *brieves*) are freely borrowed where they suit the case; and in the principal claims regarding land, as in the writs *de recto*, *de nova dissaisine*, and *de morte antecessoris*, the forms had already become stereotyped after the English models.

It is curious that a precise date cannot be now assigned to the survey and valuation so constantly referred to in later times as the 'Old Extent.' The Statute of Robert I. at Cambuskenneth in 1326 fixes the date as in the reign of Alexander III., and it probably belongs to the early part of that reign. Possibly it may have been the carrying out of a scheme planned by Alexander II. for defraying the costly levies and expeditions of which we hear toward the close

[1] Innes, Scotch Legal Antiquities, p. 54.

[2] The style was common in Scotch charters up to 1745. It is abolished by the Act 20 Geo. II. c. 43, which recites—what it may have been then convenient to believe—that the heritable jurisdiction imported by the words had long fallen into disuse.

of his reign. It remains on record as confirmatory evidence of the prosperous condition of Scotland in the time of these Kings.

Two Statutes of the reign of Alexander II. claim attention as bearing on the relation between the feudal holding and the actual possession and cultivation of the land. One of these is dated at Scone in the year 1214 (being the first year of this reign), and in the collection of laws which has come down to us is entitled 'De assedatione et aracione terrarum.' The King 'cum communi consilio comitum suorum,' for the benefit of the country, decrees that all rural cultivators (*rustici*) in the same village lands (*locis et villis*) which they have occupied in the past year shall this year carry on cultivation, and shall in no-wise delay, but fifteen days before Lady Day with all diligence begin to plough and sow their lands. Further, that husbandmen (*agrestes*) who have more than four cattle (*raccas*) must for their own sustenance take their lands under their lords and plough and sow them. Those who have less than five cattle (*raccas*) are to delve and sow the ground as best they can; and if they have oxen are to sell them to those who can use them for ploughing. Earls and other feudal tenants who refuse to act in accordance with the law are to forfeit eight cattle (*raccas*) to the King or other feudal superior. If a bondman so refuses, his master is to take from him a cow and a sheep and thus compel him to obey the law. The Statute concludes with a quaint warning that those who are too slothful to plough in winter may beg in summer and will get nothing.

This Statute appears to point to some exceptional circumstance, perhaps a scarcity, in the preceding year. It seems an indication of emergency that the Earls (*comites*) are the only estate consulted. The Statute indicates nevertheless the exemption, or a step towards emancipation, of the agricultural class throughout the country from any services of ploughing and sowing in the demesne land of their lords. The enactment accords with the tradition, embodied in Wyntown's rhyming chronicle, that King Alexander brought a good breadth of land under plough, so that 'corn he gart be aboundand' (Burton, Hist. ii. 197 note). The credit is indeed given to Alexander III., but the tradition may well have been due to the policy of his predecessor.

In this connection may be cited two laws enacted in the previous reign, that of William the Lion. They are dated at Scone, probably in the year 1209, and are expressed to be made 'de communi consilio et deliberacione prelatorum comitum et baronum ac libere tenencium.' The one (in the collection extant) bears the heading 'Omnes debent de suo vivere,' and ordains 'quod comites barones et libere tenentes regni conservent pacem et justiciam in servis suis et

quod vivant ut domini de terris et redditibus et firmis suis et non ut husbandi non ut pastores devastantes dominia sua et patriam cum multitudine ovium et bestiarum penuriam paupertatem et destructionem in populo Dei inducantes.' The other, headed 'De vita et honestate clericorum,' ordains 'quod viri ecclesiastici vivant honeste de fructibus redditibus et emolumentis ecclesiarum ita ut non sint husbandi neque pastores neque mercatores.' These laws are clearly intended to discountenance any attempts on the part of lords to extend the cultivation of their own demesne by the undue exaction of services from their rural tenants. Correlative to these enactments are stringent laws for reclaiming fugitive bondmen and carefully framed regulations with respect to mills and multures, which were regarded as an important source of profit—as indeed they long remained—to the lord.

The other Statute of Alexander II. above referred to, is one of a series of important laws dated in the year 1230, and made in presence of various magnates, including the two Justiciars. It bears the heading 'De dissaisina facta sine judicio,' and enacts that 'If any man complains to the King or his Justiciar that his own lord or any other person has unjustly and without sentence of a Court dispossessed (dissaisivit) him of a tenement of which he was first vest and seized (vestitus et saisitus), and shall find sureties for prosecuting his complaint, the Justiciar, or the Sheriff by precept of the King or his Justiciar, shall make enquiry by worthy men of the country (per probos homines patriae) whether the complaint is just. And if on the enquiry and proof it is found to be so, the Justiciar or Sheriff shall restore him to the possession (faciet ei resaisinam) of the land from which he was dispossessed, and the dispossessor shall be in the King's amercyment (in Regis misere-cordia). But if it shall be found that the complainant has made unjust complaint, the complainant shall himself be in the King's amercyment to the amount of 10*l.*'

It is impossible to read into this Statute the notion that the complainant who alleged that he had been '*vestitus et saisitus*' was required to prove a formal investiture in his favour according to feudal rules; and, but for the rules of Scotch law which are found existing at a later period, no one would have imagined such a construction possible. It is clear that the Statute, by the words 'saisitus' and 'dissaisitus,' means 'possessed' and 'dispossessed' and nothing more. 'Seized' is indeed, in its primary sense, nothing more than 'possessed;' but by association with the feudal investiture, the essence of which is possession taken in a formal manner, the words 'seized,' 'saisine' or 'seizin,' have acquired a secondary and special meaning. This construction of the Statute is supported

by the authority of Mr. Hill Burton, than whom none had better opportunities—or better used them—of forming a just estimate of the effect of a law of this period. After referring to the burgh customs (common to England and Scotland) by which a bondman residing a year and a day within the burgh became free, and to a rule—probably an ancient one—which allowed liberty to one who had for seven years been settled peaceably on any person's land, and then stating the substance of this Statute, he remarks[1]:—'In later times, an inquest or jury sitting on such a question would look to written titles. In Alexander's time, unless in important cases of feudal investiture and performance of homage, there would be nothing to establish the peasant's holding, save the testimony of neighbours that the family of the ejected peasant had as far as was known been possessed of the holding, or, perhaps, the recollection to that effect of the true men themselves. We may here see one out of apparently a number of shapes in which the thrall, bondsman or serf, not being one of a caste condemned to slavery, might by degrees found a heritage of freedom for his race. Through the favour of accidents which have relieved him from strict vigilance, he has lived seven years on the estate of a man who has perhaps found him useful. He and his family there abide for a generation or two; and then if the lord of the soil desire to eject his descendant, it is found that the family have an established right to their holding.'

There was another way, at this early period, in which the conditions of the law in Scotland were more favourable than in England to the emancipation of the servile classes. The two powerful factors to this result were the Burghs and the Church; and in Scotland the power of the Church in this direction were not restrained as in England by the movement of which the Constitutions of Clarendon (1164) were the outcome. By a clause of these celebrated Constitutions it was enacted 'that the sons of villeins should not be ordained clerks without the consent of their lords,' and it is significant that Glanvill, in treating of the ways in which villeins may acquire freedom, makes no mention of the effect of ordination. In the parallel chapter of the Scotch book of the law known as Regiam Majestatem (to be hereafter described), there is a section headed 'De servis non ordinandis;' where it is assumed that the bondman when ordained would be *ipso facto* free; but the question is discussed whether a bondman ordained without the knowledge or consent of his lord could be brought back into bondage. The conclusion arrived at shows a compromise, but one more in favour of the Church's claims than the sentence of the English Constitutions. If the bondman has been promoted to one of the

[1] Burton, Hist. of Scotland, vol. ii. p. 153.

minor orders (as a clerk) both without the knowledge of his lord and without either the person who presented him for orders or the person who ordained him being aware of his true *status*, he could be called back into bondage and given up to his lord. 'But' (as the later vernacular translation runs) 'gif he be made a priest, he shall serve his master in God's service, rather than anie other man.' So if he is made a monk, he shall be free. If he is ordained to any order with the knowledge of the person presenting or ordaining him, he is to be free ever after, but the person so acting in privity of his *status* is to give the lord another bondman.

One more law of the reign of Alexander II. may be here referred to as bearing on the lowest condition of persons. The law is entitled 'De modo duelli secundum condiciones personarum;' and the privileges of persons of various conditions in regard to the important right of appeal by combat are enumerated. Knights and holders of free tenements are entitled on certain conditions to fight by deputy. Bondmen, and those who cannot claim the rights of freemen either by reason of tenement or descent, are equally entitled to the appeal of battle, provided they fight in their own proper persons, or else that their lord takes up the quarrel.

It is difficult to resist the impression that, in the twelfth and thirteenth centuries, not only were the modes of escape from the servile condition more easy in Scotland than in England, but that the condition itself left more freedom of action to the bondman. Certainly there is no trace in Scotland of the condition of the peasant bound generally 'to do as he is bid;' a condition described as frequent by Bracton and mentioned even by Coke as not quite obsolete. There was nothing, at this period, or at any early period of Scotch law, analogous to the harsh forest laws which figure so largely in early English statutes. Nor until the time of Edward I. did there exist in Scotland a castle of the Norman type. It seems reasonable to believe that to the strong and popular government under David I. and the Alexanders was owing the existence in Scotland of an independent burgher class and free peasantry, such as bore the brunt of the War of Independence, and through the succeeding century maintained successfully an incessant struggle for national existence.

Up to this point the differences which can be assigned to the laws of Scotland and England are of the same class with the differences which might be shown to exist between the administration and usages in various parts of England at the same period. The point is now reached of divergence between the laws of England and Scotland as two distinct systems of law. The direction and extent of this divergence in regard to the land laws will form the subject of another essay.

R. CAMPBELL.

THE TEXT OF BRACTON.

THE *Law Magazine and Review* for August 1872 contained, under the heading 'A Plea for a New Print of Bracton,' an article by Mr. H. S. Milman, which animadverted strongly on the fact that there was no reliable text of the chief medieval treatise on English law. Since then Sir Travers Twiss' edition has appeared, in six bulky volumes of the Rolls Series, and still there is every reason to plead for a revision of Bracton's text. Warnings were not wanting while the new edition was in progress—the *Saturday Review*, for instance, entered more than one protest against the management of the work, and exposed many blunders. These warnings were disregarded, however, and the result has been the production of something rarely equalled in the history of learning.

It is not necessary even to look into the MSS. in order to see that Sir Travers Twiss' work has been done in an utterly careless way. Even a casual reader will ask, with wonder, why the extract from the Tower Roll, 18 Henry III, has been printed twice, as an appendix to the second and to the sixth volume. One need not be a great sceptic to doubt the reasonableness of giving the long passage—'ut si quis donationem fecerit .... si autem maior, tunc relevium,' first on pp. 260, 262, and then on p. 270, of the first volume. There are differences to be found in both cases, but only in the editor's translation[1], where, for the sake of variety, the 'first-born' and 'after-born' of p. 261 get changed on p. 271 into 'earlier born' and 'later born.' Of course Tottell made the mistake 300 years ago, but he did not translate, at least; and as for the MSS., they give the passage either in one place or in the other, and not in both.

It is amusing to see how Sir Travers Twiss gravely follows Tottell in the latter's most obvious mistakes, although the necessity of providing for a translation ought to have taught him better. On f. 191 of the book of 1569 we find, for instance, the following:—

'Item videtur quod non poterit quis terras vel catalla a seruo vel fugitiuo qui fuerit extra potestatem et in statu libero auferre sine corpore, propter verba in breui de natiuis contenta, ubi praecipit dominus Rex quod vicecomes faciat ei habere natiuum et fugitiuum suum, cum tota sequela sua, et cum suis catallis, et unde videtur quod sine iuditio catalla sua auferre non potest, quia si ita, talia

[1] Except that between the two places, p. 262, the person employed to copy out Tottell's text has become tired of writing out the contractions, which accordingly disfigure the rest of the reprint.

verba scilicet (cum catallis) in breui *perperam, propter personam*, posita effectum non haberent.'

The words 'propter personam' do not make sense, are not justified by the MSS., and may have got in as a consequence of mistaken attempts to extend the contraction 'ppam.' Sir Travers Twiss not only prints them, but actually translates them by 'in the writ, near (!!) the person.' I think that a careful student of the new editor's translation would get quite new lights about the meaning of Latin words in general and prepositions in particular. A passage in vol. i. p. 173 would have shown him that *pro* must mean '*by*' and not '*for*' or '*instead*,' and this rule would impress itself upon him as a very stringent one, because the translation 'by a deed' effectually gets rid of the sense of an entire sentence[1].

Once on his guard, an attentive reader may often guess at true readings through the film of the perverted text set before him. He will not believe that the first words of Book IV. ch. 21 are 'Si vero nihil scit, quod excipi potest' (translation—'but if he *knows* nothing'), and will find out 'Si vero nihil sit' for himself. A few lines lower down he may alter the absurd '*cum*' into '*tamen*.' Neither is it impossible to guess that 'Si autem totum non habuerit *statum*, transfert id quod habet' (f. 40. c) ought to be amended by changing 'stat*u*m' into 'stat*i*m': at any rate, no reader even a little conversant with classical or medieval Latin will believe the translator who renders 'statum' by 'estate.' But, after all, editions in six volumes are not made with the view of sharpening the critical faculty of law and history students, and all casual corrections by guess-work must certainly produce in the end a complete distrust of the received text.

This feeling can only be heightened if the student takes even a chance view of the MSS. What trust is to be put in an editor who describes MS. Tanner 189, at the Bodleian, in the following words: 'This MS., which is catalogued as a Bracton and for that reason has been here mentioned, is in fact a portion of the Law treatise in the Anglo-Norman tongue known as Britton and Bretoun, which was composed in the reign of Edward I'? Now there is not a single word of Anglo-Norman nor a line of Britton in the MS., which is a plain Bracton in Latin, with some omissions and transpositions. If a hopeless muddle is made of the plainest things, there is no chance of getting over difficulties by the help of such an edition. The 'coraagia et carvagia' of f. 37, translated

[1] The point is that a gift in frank marriage ('free maritage' in the dialect used or sanctioned by Sir Travers Twiss) may bind the donor to warranty without a deed or homage: 'quia femina per donatorem sic maritata, vel eius pueri vel heredes, *si* ipsa obierit, erunt pro charta et sufficiunt pro charta:' translated, 'will be [maritaged] (*sic*) by a deed, and are sufficiently [*so*] by a deed.'

'coraages, carvages,' and explained in the index as 'common contributions,' may well astonish any student of medieval customs. Many MSS. have got here corrupt readings, but some of the better give the necessary clues. Rawl. C. 159, and Digby 222, for instance, read *cornagia*[1] as the first word; Rawl. C. 160 gives *carvcagia*[2] as the second. Sir Travers Twiss actually puts in a foot-note to say (vol. i. p. 290): '"coruagia," "et" being omitted in MS. Rawl.' No better example could be given of his peculiar knack in hitting upon absurdities and overlooking matters of any importance.

Nothing else could be expected, after all, from a reprint of the book of 1569, which was pronounced full of gross errors by Selden some 240 years ago[3]. The few notices of varieties of reading are quite insufficient to resettle the text, and seem inserted very much at random. Sometimes a trifling difference of spelling is followed out through four or five MSS.; in other cases most important discrepancies are left without any comment. No attempt has been made to establish anything like a pedigree of MSS., although it is very easy to perceive that they group themselves into classes which stand in definite relations to each other. Yet nothing could be done in the way of printing a critical text of Bracton without this preparatory work. The number of existing and known MSS. is so large, the constitution of their text so very different, that it was a matter of obvious duty for the editor to make a selection on the basis of a careful classification. Sir Travers Twiss did nothing in this way, beyond noticing whether a MS. was provided with a table of contents or not, in how many books and chapters the text was divided, and what was the wording of a passage about the tree of consanguinity. This cannot be called even an attempt at rational classification. The result has been that the MS. specially pointed out as best, Rawlinson C. 160, seems quite unfit to give a standard text. I shall have occasion to notice hereafter some of its particular readings; I will now point out the reasons which lead me to assign it a very secondary position. It is much too complete; it gives many passages which are left out by the MSS. of older writing and look decidedly like later insertions. In the very description of the tree of consanguinity, which Sir Travers Twiss has taken for the criterion of merits, Rawl. C. 160 has several columns of additional matter on ff. 36, 37, and 38, and stands quite alone in this respect.

[1] Nichols in the Archæologia, xxxii, 2 section.
[2] Cf., for instance, Stubbs, Constitutional History, i. 510.
[3] Dissertatio ad Fletam, p. 464: 'Menda sunt perplurima eaque crassissima, partim e librariorum inscitia, partim ex operarum incuria.' Sir T. Twiss has contrived to add to both classes.

This fact, along with the coloured drawing of a tree on f. 37 b, allures the new editor into giving Rawl. C. 160 the palm among Bracton MSS.[1] But is it at all likely that only one copy, and a late one, should have kept the original text intact, while all the rest, though constantly at variance between each other in other matters, should have all gone wrong in the same way in omitting a whole section of the treatise? I presume that even Sir Travers Twiss himself was not quite confident as to the soundness of his verdict on this occasion; or why did he not restore the true text in a footnote, or rather in an appendix? Surely the discovery of a hitherto unknown genuine passage of Bracton, which would fill some ten to fifteen pages of print, was a matter of no slight interest and importance. Of course the aspect of things changes greatly if the whole paragraph has been put in from some other work, as an illustration to Bracton's text, by the lawyer for whom or by whom Rawl. C. 160 was written.

In fact, a look at the additional pages of Rawl. C. 160 is sufficient to show how wisely Sir Travers Twiss has done in withholding from his readers a knowledge of the text 'which is on the subject of the degrees of consanguinity, and was probably a copy of the treatise, as originally drawn up by Bracton' (Introd. p. xxi). To begin with, the drawing on the existence of which such stress is laid represents a tree not of consanguinity, but of affinity, a quite different thing, as the learned editor must have known. The arbor consanguinitatis is described too, but higher up and with no drawing at all, to illustrate the description. What has the subject of affinity to do with Bracton's chapter treating of the order and degree of succession? Nothing, of course; but it has much to do with the canon law of marriage, and, in truth, the whole insertion is clearly a fragment from some decretalist's treatise, 'de consanguinitate et affinitate.' In substance it is very much like the celebrated disquisition of Johannes Andreæ upon the subject[2], but more diffuse and probably anterior, as it stands in Rawl. C. 160, written in the beginning of the fourteenth century. Rhymed rules are quoted, which may have been taken from the versified treatise of Johannes de Deo[3]. Besides these indications, which would place the work somewhere in the second half of the thirteenth century, there are many more which, though partly obscured by the bad transcription of Rawl. C. 160, might lead an experienced canonist to determine exactly from what literary production of the thirteenth century these pages have been taken. But an extensive knowledge of

[1] Vol. i. Introd., pp. xxii, xxiii.
[2] Corpus juris canonici, ii. 1231 sqq.
[3] Cf. Schulte, Quellen des Canonischen Rechts, ii. 100.

canon law is not required to see that the whole does not fit into Bracton's book at all and presents a totally different treatment[1].

Bracton refers in some few instances to the Decretum Gratiani and the Decretals (cf. Güterbock, 38), but even his way of giving his references is different from that followed in the insertions. Take f. 63 for example: 'Et ad hoc facit decretale cujus verba hæc sunt inter virum et mulierem;' the schooled canonist of the insertion always quotes the 'extra.' So much for Sir Travers Twiss' great argument in favour of the special authority of Rawl. C. 160. The labour of settling the relation between the MSS. and selecting the necessary foundation for a text cannot be undertaken lightly, and must be left to the scholar who may try his hand at a real edition of Bracton. Still I believe that even a limited acquaintance with the MSS. will enable me to point out one of the greatest difficulties which surround the student of Bracton at present, as well as how such difficulties are to be avoided. Even if we take our knowledge from Sir Travers Twiss' prefaces and notes, we cannot help recognizing the fact that there are some passages in the text — as printed in 1569 and lately — which were not drawn up by Bracton himself, but were inserted at a later period by those who used the treatise. Such is the reference to the case decided by John of Metingham which stands in some copies, though this Judge acted in Edward the First's reign. This is a most glaring instance, but in two or three other cases the last editor supposes[2] a similar interpolation, and his notes point out not unfrequently that a particular passage is omitted by some of the MSS. The reader may well ask himself whether the shorter redaction does not represent an older state of the text, enlarged and developed subsequently by additions and glosses. Any such supposition cannot ripen into conviction on the ground of the casual

[1] I will just print the beginning to satisfy the rea er about the character of the insertion. It must be remembered that one leaf has been cut out and the text begins abruptly :—

'ut ex[a] de consanguinitate et affinitate non debet (meaning the Decret. Gregor. IX. lib. iv. tit. 14, chap. 8), et ut ibidem scribitur quaternarius numerus bene competit prohibicioni conjugii corporalis de quo dicit apostolus 1° ad Corinth. vii. a. quod vir non habet potestatem sui corporis sed mulier, nec mulier habet potestatem sui corporis sed vir quia iiii[or] sunt humores in corpore quod et constat ex iiii[or] elementis. Ad horum autem graduum computacionem diffinicionem cognoscendam apponitur non solum doctrina docentis, sed et pictura arboris. Hii enim duo sensus scilicet auditus et visus sunt sensus disciplinales, ut inter omnes sensus primatum tenet visus, quia agit luce pura, sed quia de arbore non intendimus nisi consanguinitatis causa. Ideo antequam arborem protrahamus, videamus quid sit consanguinitas et quot sint linee, quid sit gradus et qualiter gradus computentur, et usus (corr. usque) ad quem gradum perhibeatur matrimonium. Consanguinitas est habitudo persone ad personam carnali tantum propagacione contracta, vel sic, consanguinitas est vinculum personarum ab eodem stipite descendencium carnali propagacione contractum, et hec omnes diffiniciones in idem redeunt, vel sic. Consanguinitas est naturale vinculum personarum ab eodem stipite descendencium carnali propagacione contractum.'

[2] For instance, i. pp. xviii, 272.

remarks in Sir Travers Twiss' notes, whereas it will certainly do so after the inspection of some of the very MSS. used for the new edition.

In the course of a study of the history of the Manor in England I found some passages in Bracton to be so strange in their wording, and to agree so little with other parts of the text and independent facts, that I resolved to verify their reading as much as it was in my power to do. For this purpose I went through the MSS. in the British Museum and the Bodleian Library, compared the Longleat copy, which the owner, the Marquis of Bath, had the kindness to send over to Oxford for my use, and made inquiries about some readings of the Cambridge and Paris MSS. As to the particular question just started by me, my survey led to very interesting results. The older MSS. and a few of the later pointed out a number of more or less important passages as insertions, glosses, notes, even in their external aspect, and, what is more, they agreed with one another in most of these cases. Some of the passages which appear in the printed books were simply omitted by all the better MSS.; very often the insertions are marked by an 'addi—cio,' which puts the interpolation as it were into brackets. A very great number of the pages of Rawl. C. 159 and Add. 11,353 are supplemented by such signs. The Longleat Codex (fourteenth century) has been written by a very indifferent scribe from an original similarly constituted, and sometimes the 'addicio' is found in the text itself against sense. The MS. Royal, 9 E. xv, at the British Museum, often writes 'plus' on the margin, and sometimes even goes the length of explaining that it swerves from a shorter original: 'in hoc libro plus continetur quam in alio,' or words to the same effect. But the best view of the gradual development of the text is presented by Digby 222, at the Bodleian (beginning of fourteenth century). The copy was evidently written in a hurry by different scribes, who divided the quires of the original and began transcribing simultaneously. The portions written by the first hand are constantly supplemented by large notes on the margin and at the foot of the pages which coincide with omissions and additions of other MSS., whereas the second hand sometimes simply leaves out the excrescent parts. The text runs quite smoothly without these, and they are mostly recognisable not only from their external position, but also from their character, being either recapitulations, explanations, supplementary remarks, or even statements which do not agree with the main body of the treatise. When these glosses get into the text, as has been the case in most copies, they produce considerable confusion; passages meant to form a whole are rent asunder, and sometimes the note wanders

about the text not finding exactly the place where to fit itself in. Now, such a state of the MSS. must at once raise the question, whether we are entitled to treat all the different elements of the received text—original stock, marginal glosses, passages omitted in earlier MSS. and inserted by later—as of equal value and common origin. Of course, there is the strongest critical presumption against passages of this last class, which embraces not a few of the standard Bracton quotations. But even the matter marked as additional will surely require careful examination and sifting. What notes are entitled to go back to Bracton's original and must be taken as the author's own additions, what other glosses represent the development of his school, and what ought to be considered as critical remarks? It is not easy to solve such questions, but inquiry in that direction, based on an adequate classification and study of MSS., would be by no means hopeless.

There is the external criterion of omissions in MSS. containing a text evidently meant to be full, a criterion which will prove most stringent as soon as the copies are got into order of age and descent: the later crusts must peel off by a mechanical process, as it were. There is the criterion of internal evidence: it cannot be applied so often as the first one, and may present sometimes a greater scope for misgivings and differences of opinion, but, on the other hand, it gives most interesting clues as to the development of legal notions and schools. Of course any systematic work in both directions must be left to the future editor of Bracton, but I should like to supplement and illustrate my general remarks by discussing one or two passages which, as I take it, can be brought out as interpolations with the help even of the scanty means at our disposal. I shall take my illustrations from the first two books, which I have been particularly studying, but the same remarks would apply with some differences in degree to other parts of the work.

1. Fol. 3, a. 'Supponitur etiam jus quandoque pro actione, quandoque pro obligatione qualibet, quandoque pro haereditate, sicut pro proprietate rei, quandoque pro bonorum possessione, quia est jus proprietatis, et jus possessionis. Item jus possessionis, sicut feodum; unde locum habet assisa mortis antecessoris. Item jus possessionis, sicut liberum tenementum, si quis tenuerit tantum ad vitam quacumque ratione. Item jus proprietatis, quod dicitur jus merum, et unde poterit quis habere utrumque. Et dividi poterit quandoque jus proprietatis a jure possessionis, quia proprietas statim post mortem antecessoris descendit haeredi propinquiori, minori et majori, masculo et foeminae, furioso et stulto, sicut fatuo, surdo et muto, praesenti et absenti, et ignoranti sicut scienti. Sed tamen non statim acquiritur talibus possessio; licet possessio et jus possessionis semper sequi debeat proprietatem. Jus autem posses-

sionis descendere poterit per se ad alias personas, et per alios gradus, ut si, cum jus proprietatis descendit ad agnatum propinquiorem, *primo natus* frater ponat se in seysinam, et sic moriatur seysitus, transvertit ad haeredes suos quoddam jus proprietatis cum jure possessionis, quod sequi debet proprietatem primam, et sic de haerede in haeredem; sed primi haeredes majus jus habent quam secundi haeredes, sed semper praeferri debet possessio, donec primi haeredes verificaverint jus suum; si tamen frater postnatus plures habuerit filios [filias ed. 1569], *et primo natus* se ponat in seysinam, ita fieri debet de eo ut supra, et sic poterit ad plures diversos haeredes descendere jus proprietatis in infinitum, ut cum plures jus habeant proprietatis, unus vel plures possunt habere jus majus. Item ponitur jus quandoque pro potestate, ut cum dicitur, "iste est sui juris," quandoque pro rigore juris, ut cum dividitur inter jus et aequitatem.'

I take this passage for discussion because it presents the first gloss inserted into Bracton's text. Sir Travers Twiss notices here the omission in some MSS. of the words from 'quia est jus proprietatis' to 'quandoque in possessione.' This last indication must be taken to mean that the omitted passage runs till 'quandoque pro potestate.' The editor then states that his text agrees with MS. Rawl. Here again 'disagrees' would be more to the purpose. The whole disquisition about the right of ownership quite loses its sense, because the new edition agrees not with any MSS. but with ed. 1569, and prints *primo natus* in two instances, where all the MSS. I have seen have *postnatus*. The insertion deals with a case when the right of ownership has swerved from its due course, the younger brother has put himself into the succession instead of his elder, and in consequence possession gets estranged from ownership. The blunder 'primo natus' makes it quite impossible to get at the meaning of the quoted lines, and, as I say, all the MSS. I have seen, Rawl. 159 and 160, as well as others, read 'post natus.'

The whole thing is of course a marginal gloss, which has been omitted by some of the better copies, left on the margin by Digby 222, and shoved itself in between two connected parts of the same sentence in most. In Royal 9 E. xv. and the Longleat MS. the gloss has changed its place and stands at the end of the chapter. Rawl. C. 159 has clear traces of 'addicio' on the margin: the *cio* is plainly written opposite the end of the sentence, and *addi-* has been changed by some one who did not understand its meaning into 'aliud.' It would be impossible to say with certainty that the interpolation is a later one and does not go back to Bracton's time, but the probability lies this way, for two reasons: the subject matter is a very lame and misplaced illustration of a difference which belongs to another connection altogether; such first-rate MSS. as Add. 11,353 and Galeazzo omit the passage entirely.

2. Fol. 6, a. 'In potestate aliena sunt servi, quae quidem potestas dominorum in servos a jure gentium est, quae aliquando fuit et vitae et necis servorum, sed nunc coarctata est per jus civile, ita quod vita et membra sunt in potestate regis, ita quod si quis servum suum occiderit, non minus punietur quam si alienum occiderit, et in hoc legem habent contra dominos, quod stare possunt in judicio contra eos de vita et membris propter saevitiam dominorum, vel propter intollerabilem injuriam, ut si eos destruant, quod salvum non possit eis esse waynagium suum. Hoc autem verum est de illis servis qui tenent de antiquo dominico coronae, sed de aliis secus est, quia quandocunque placuerit domino, auferre poterit a villano suo waynagium suum et omnia bona sua. Expedit enim rei publicae ne quis re sua male utatur.'

In this case we can speak with more confidence, and the matter in itself is of far greater importance. The quoted text follows rather closely the wording of Azo, Instit. I. p. 1077, who in his turn is stating the doctrine of slavery, mitigated by humanity, as settled in the later Roman law by the emperors, especially Hadrian and the Antonines. The definition of *intollerabilis injuria* is, however, quite peculiar to Bracton, and evidently based on English practice. For Azo and the Romans the 'intollerabilis injuria' is equivalent to infamia corporis; there is no trace of any protection afforded to the slave's possessory claims, and the only cases in which the law stept in between the slave and his master concern the person of the slave, which is recognised as a human personality. Bracton goes further, explains 'intollerabilis injuria' to mean the taking away of the waynage, and admits a right of the villain, nicknamed 'slave' after the Roman fashion, to sue against his master on possessory grounds. After swerving deliberately and in such an important matter from Azo's text, the English lawyer adds a material qualification, by the sentence 'hoc autem verum est . . . bona sua.' Further inspection shows, however, that this last sentence is simply heterogeneous to Bracton's text, and that we have in truth to deal with a marginal gloss. It breaks up the continuity of the reasoning and severs the statement from its motive: the master is restricted by the State in his power over the slave—because the State is interested that nobody should misuse his power over things. It is not only a gloss, but a gloss in opposition to the text, and is not so much a qualification as a direct contradiction. The text speaks of serfs quite generally, the insertion restricts the statement to a comparatively very small class of persons, who in Bracton's terminology and classification are not *servi* at all (f. 5 a, cf. 7 b). It does not fit even that small class, because the socmen in ancient demesne, of whatever condition they may have been, were civilly protected, not only in

their waynage, but also in their holdings and even as to the amount of their dues and duties. A look at the MSS. will lead us out of this confusion. All the older and better amongst them, and even some of the later, *Rawl. C.* 160 *not excepted*, have got no trace of the inserted passage[1], not even as a gloss. This fact has been thought beneath notice by the editor, but it is a fact, and leads to very evident conclusions: Bracton's text ran without any qualification, and the restriction we find in the printed books is a very awkward attempt of later lawyers to reconcile Bracton's assertion with the practice of their time. The attempt must have been made rather late in the day, and perhaps in consequence of the treatment the matter had received in Fleta and Britton. However that may be, the main fact, namely, that Bracton spoke of the right of serfs that is, villains, to sue against their lord for their waynage, seems established on internal and external grounds.

This fact suggests important considerations. On other occasions Bracton does not mention the right, and it is well known that the Law Courts of the thirteenth century did not admit it as a rule. Still our passage is by no means an isolated one, and provides us with another and most important link in a chain of evidence, which tends to show that the civil incapacity of the villain as to his lord only gradually developed itself out of a state of things in which his position as a bearer of civil rights was recognised. So late as in the beginning of the fourteenth century the Mirror of Justices (quoted by Nichols, Britton, I, 197) speaks of the villain as a free man and argues from the Charter that the lord has no right to take away his waynage. The conception is an erroneous one, of course, the great Charter putting a limitation only on the amercement of villains by the king, but the idea must have been very prevalent and have coincided with the popular view of the position of villains as to their lords. On the other hand the Leges Willelmi—which may be taken as a sample of the legal principles commonly accepted at the close of the eleventh and the beginning of the twelfth century—treat the relations between lord and villain as regulated and protected by the State (c. 29[2]), a view of them which is quite consistent with the fact that the villains of Norman time have sprung from the free ceorle of Saxon history. In this connection our restitution of Bracton's text gains additional interest and importance. Bracton's sentence appears as a theoretical survival

[1] Add. 11,353, Roy. 9 E. xv, Rawl. C. 159, Rawl. C. 160; Digby, 222; Bodley, 170; Longleat, Galeazzo (Paris, Bibl. Nat. 4674). For the reading of this last most important MS. I am indebted to my friend the Editor of this Review.

[2] Labourers (cil qui custivent la terre), paying their dues and performing their services, are not to be disturbed in their holdings. The Latin version calls them 'coloni et terrarum exercitores.'

of the older state of the law giving way before the encroachments of feudal lords, the generalisations of Romanistic lawyers and the difficulty of the King's Courts enforcing actual and general protection in such case

3. Fol. 34. 'Item nec factum regis, nec chartam potest quis judicare, ita quod factum domini regis irritetur. Sed dicere poterit quis, quod rex justitiam fecerit, et bene, et si hoc, eadem ratione quod male, et ita imponere ei quod injuriam emendet, ne incidat rex et justiciarii in judicium viventis Dei propter injuriam. Rex autem habet superiorem Deum scilicet. Item legem, per quam factus est rex. Item curiam suam videlicet comites, barones, quia comites dicuntur quasi socii regis, et qui habet socium, habet magistrum, et ideo si rex fuerit sine fraeno, i.e. sine lege, debent ei fraenum ponere, nisi ipsimet fuerint cum rege sine fraeno, et tunc clamabunt subditi et dicent, Domine Ihesu Christe, in chamo et fraeno maxillas eorum constringe; ad quos Dominus, Vocabo super eos gentem robustam et longinquam et ignotam, cujus linguam ignorabunt, quae destruet eos, et evellet radices eorum de terra, et a talibus judicabuntur, quia subditos noluerunt juste judicare; et in fine, ligatis manibus et pedibus eorum, mittet eos in caminum ignis, et tenebras exteriores, ubi erit fletus et stridor dentium.'

These interesting sentences, which breathe the spirit of the Provisions of Oxford, are omitted by Roy. 9 E. 15, Add. 11,353, Digby 222, while Rawl. C. 159 introduces them only as an addition. Thus external evidence speaks against admitting that the passage in question belonged to Bracton's original. And here again the testimony of the older MSS. coincides with considerations drawn from the meaning. The lines quoted above have been written apparently to match fol. 5 b–6 a. The same expressions are used in both instances, but the theories examined are at variance with each other. In the first book the author, undoubtedly Bracton, acknowledges no human superior to the king. Only God and the law are above him, and if he breaks the law, nobody can correct him but God. In the interpolated sentences of fol. 34 the king's peers are recognised as his superiors when they act as the body of his court, and it belongs to them to watch over the king's doings and shape them according to the law. In fact the two passages seem to represent two doctrines current at the time of Henry III, one which countenanced more or less the king's arbitrary acts, the other in keeping with the celebrated Latin poem in honour of Simon de Montfort and the acts of the baronial body. It is difficult to believe that the same man should have written in both senses in the same work, and the fact that in the second instance we have an interpolation shows us which was Bracton's personal inclination.

I think these examples are sufficient to show that even an

incomplete comparison of MSS. would raise many questions of general interest, and to hint at solutions which disagree materially with the received notions about Bracton's text. Let us hope that the failure of the Rolls edition will not deter English scholars from the arduous task of preparing another one more worthy of the great thirteenth-century lawyer. When Pertz, jun., spoilt the volume of Merovingian charters in the Monumenta Germaniae, the fact proved only an incitement to the new directors of that great undertaking to start the work afresh. Any similar attempt as to Bracton would be the more promising, in that it could follow the lines of a standard edition of a medieval law-book—Nichols' edition of Britton.

PAUL VINOGRADOFF.

JURISPRUDENCE; ITS USE AND ITS PLACE IN LEGAL EDUCATION.

FOR the purposes of the present article, Jurisprudence may be defined as the Science of Positive Law. These words indicate its province and its method; which must, however, be somewhat more fully explained before we can state its use or its place in legal education. By the word Positive is here understood nothing more than actually existing or having actually existed: a sense of the word which appears to be fairly established not only in other cases, but particularly in that of law. With Austin, Positive includes the idea of some sort of enactment; but it is at least questionable whether there are not instances of actual working law, recognised as such by the majority of civilised people, without the necessary admission of any such idea. Great part of what is usually and reasonably termed Constitutional Law falls within this category, whether we allow the so-called International Law to bear that name or substitute Austin's phrase of International Morality.

The most important result of confining Jurisprudence to Positive or actual law is to exclude from its province all rules not gathered from observation but deduced *a priori* from assumed first principles. Here we therefore take leave of the time-honoured Law of Nature, so far as it represents the mere speculation of philosophers. The limitation contained in these last words appears necessary. Current morality, that is, a generally prevalent approval of some actions and disapproval of others, may also be referred to Nature; but this subject stands, for us, on a very different footing from the shadowy Law of Nature which we have just discarded. Jurists may bring themselves to hold, as Austin seems to have held, that law is nothing but a system of commands, obeyed, at least in the first instance, from fear of the evil conditioned on disobedience; and that even the distinction of Right and Wrong is a question of conformity or non-conformity to an imposed rule. But it may be confidently stated that this is not the view of the majority of mankind; whose views and whose motives for obedience to law must surely be admitted as factors in the practical existence of law itself. The recognition, therefore, of some current distinction between Right and Wrong, as an antecedent fact bearing upon law, is a different thing from the building up of a system upon original axioms of human nature. Positive law, in the strictest sense, while it may

and should be distinguished, cannot be entirely separated, from Positive morality.

Another apparent enlargement of the proper province of Jurisprudence may easily be seen to be in truth part of that province itself. Except in the earliest and rudest systems, certain modifying conditions, mental or physical, of a *prima facie* offender against law, are universally taken into account. Hence any treatment of modern law, practical or scientific, which contemplates the possibility of offenders and the mode of dealing with them, must necessarily involve some limited reference to mental philosophy or psychology. There is indeed no part of Jurisprudence more fundamental or essential than this.

It has also been held to follow, from the definition of the province of Jurisprudence here adopted, that our subject has nothing to do with the goodness or badness of law, with ideals or even with reasonable projects of reform. A consideration of these matters finds its place, we are told, in 'Principles of Legislation;' not in Jurisprudence, which deals with law as it is or has been rather than with law as it ought to be.

The distinction is, at any rate, an extremely important one. Most of the older works on law in general, and many of the modern ones, are rendered next to useless by the indiscriminate admission, on an equal footing, of principles sanctioned by practice and principles only suggested in theory. And yet a hard and fast line, drawn between the principles of law and those of legislation, cannot be considered very satisfactory. It is easy to see that such an important work as the 'Traités' of Bentham belongs mainly to the latter, and the excluded one, of these subjects. Austin himself admits the frequent combination of the two, under the single title of Jurisprudence. And later authors not unreasonably represent the improvement of law to be half the *raison d'être* of its science.

The determination of the province of Jurisprudence in this quarter appears to depend upon the particular object with which the study is pursued. By statesmen, Jurisprudence will mainly be looked at as a means to good legislation: for the student, its primary end is the attainment of clear ideas on law as a matter of historical fact. Towards this end, a consideration of the objects proposed by law, and its suitability for attaining those objects, will no doubt be from time to time necessary: but if the chief place be given to such consideration, it is apt to lead the mind of a learner into that fatal confusion between the actual and the desired, to which reference has already been made.

Enough, however, has been said of the province of Jurisprudence: it remains to add a few words as to the method which is indicated

by the word Science employed in our definition. When we speak of Jurisprudence as a science, we are not, of course, to forget that positive law is, after all, a matter of human practice and expedients. That universal and necessary character which is claimed for the conclusions of some other sciences cannot be here expected. The main object, in fact, of calling Jurisprudence a science, is to distinguish it from the Art which relates to the same subject-matter. As a science, then, Jurisprudence deals rather with the general principles notions and distinctions of law than with their application to individual cases or their embodiment in detailed rules. It will scarcely be denied that a certain amount of such principles notions and distinctions can be obtained, by generalisation and abstraction, from the rules and cases of any particular body or system of law. In this case, the results are styled Particular Jurisprudence, which is the only strict or correct use of that phrase. It is, however, generally and not unreasonably assumed that there are certain principles notions and distinctions common to *all* systems of law, at least among nations which have attained any appreciable degree of refinement or civilisation. These are the objects which it is the special aim of Jurisprudence, as here understood, to set forth; and they are undoubtedly best ascertained by a comparison of different systems. Hence it has been, with much justice, maintained, that all Jurisprudence is practically general or comparative, and that the distinction of Jurisprudence into general and particular is of little use, if not actually misleading, on account of the ambiguity with which the latter term has been employed.

A step further has been taken by some writers, who endeavour to make out that the common principles obtained by the above method are in fact *necessary*, as resulting from the universal nature of man. Such an endeavour goes considerably beyond that recognition of some general distinction drawn between Right and Wrong which, as it has been shown, may fairly enter into the view of Positive Law. The inferences or deductions made by these writers would appear to claim a universality which those of Jurisprudence (in our present sense) do not and cannot claim. But, at the same time, they pass, from the region of *a posteriori* reasoning upon experience, to that of *a priori* speculation.

With regard to its utility, the study of Jurisprudence would appear to be an indispensable preparative for the work of legislation or legal reform. Neither clearness, nor comprehensiveness, nor consistency with their existing law, can ever be attained by legislators ignorant of the general principles notions and distinctions of that law itself. And, beyond these, the wider generalisations arrived at by a comparison of different systems are of a double service to

the national legislator or reformer. On the one hand, they supplement and elucidate the Particular Jurisprudence (to use that term in its strict sense) of his own country: on the other hand, they mark out so much of legal principles notions and distinctions as has been preserved by a general consent, and is therefore likely to have substantial utility for its basis.

The uses of Jurisprudence to the private student and intending practitioner are, as will be gathered from what was said about its province, somewhat different from its uses to the statesman. If the student be engaged upon a body of law which is capable of scientific exposition, it has been forcibly urged that the abstract system might as well be acquired together with, and through the medium of, the concrete application. Such a capacity, however, is certainly not as yet possessed by the law of many nations; and is not conspicuously the virtue of our own. Even after considerable improvement in this respect, it would still seem desirable, if possible, to establish in the mind of the learner a few leading ideas, and some general system or outline, before he commences what will otherwise be a very bewildering and discouraging study.

For this purpose, it may still be questioned whether a better scheme can be suggested than that of Austin's Lectures. First, of course, must come the by no means easy task of defining what is meant by that Positive Law which constitutes the Province of Jurisprudence. With this definition must be coupled some analysis of the fundamental ideas indicated by the words Right, Duty, and Wrong; which again require a special appendix or excursus on the conditions of Legal Liability.

The consideration of the different Modes in which law is made or grows—by custom, by direct enactment, or by judicial decisions—though clearly necessary, appears to me, of all Austin's topics, the one least worthy of independent treatment. Its most convenient place will practically be found in the definition of Positive Law. The subdivision of law, on the other hand, by reference to the Subjects with which it is conversant, is a matter of distinctly substantive character and very high importance. Returning for a moment to the legislator, I may remark that this is the study beyond all others indispensable for the universally desired end of a rational codification. To the ordinary learner, again, hardly any preparative can be of greater value than to know what subdivisions of the immense subject before him have been thought useful, upon what actual differences they depend, what is the importance of those differences, and the resultant worth of the classifications depending upon them.

Such are the preliminary topics with which a law student might

advantageously begin his course of reading, instead of plunging *in medias res*, as many still do. But it must be admitted that the necessary manual scarcely seems to have been yet drawn up. Writers on Jurisprudence have generally erred in one of two ways. They have strayed off into *a priori* speculation, in which case the whole of their work is insecure: or they have entered too much into details of practical law, in which case they lack the simplicity required for an introduction. From the first fault Austin's Jurisprudence is quite free; and, to some extent, from the second. He confines himself absolutely to facts, as known to him: he devotes himself in the main to the consideration of those leading ideas which most require correct apprehension. On the other hand, many of his views, as to fact, must be questioned, chiefly in consequence of historical and philological research which has taken place since his time; some of his illustrations require a knowledge of detailed systems of law which cannot be expected in a beginner; and his style, though severely logical, is neither easy nor attractive. The book should certainly be read as a whole; for all, or almost all, the subjects treated in it are of primary importance, and the periodical selection of a special portion, though convenient for examining bodies as a means of varying their set subjects, has nothing else to recommend it. If a student be constrained, by any such arrangement, to expend his energies specially upon one part of Austin's work, he will do well to take at least a cursory view of the remainder, either in the form of an analysis or of a well-drawn table of contents.

Considerations such as these point to the supersession of Austin's Jurisprudence, except as an exercise for more advanced students, who can weigh and criticise their author instead of merely swallowing his somewhat arbitrary dogmas. For such readers few works could be better suited, provided that a certain amount of comment or reference to other authorities be allowed to qualify what seems to have been hitherto regarded as a sort of gospel truth. It is scarcely necessary to refer to the well-known works of Sir Henry Maine and to the 'Jurisprudence' of Professor Holland, for this purpose.

It is in the same more advanced stage of study, as it appears to me, that a place should be found for that so-called Jurisprudence which deals with Principles of Legislation—which discusses the ends or objects of law, and the comparative merits of the different means adopted for attaining them. Interesting and valuable as such a discussion is, it should certainly come *after* the knowledge of some actual legal system—notably that of the student's own country. Indeed, there is much to be said for the plan followed

by the University of London, which confines this subject exclusively to those few students who proceed to the highest degree of Doctor of Law.

For beginners, the great *desideratum* is a manual of Jurisprudence, very much shorter and simpler than Austin, but based upon the main lines of his scheme. These requirements are so nearly satisfied by Markby's Elements of Law that I hesitate to suggest any improvement upon that useful work. Its acceptance of Austin's strict definition of law appears to me open to question, and its treatment of the subdivision of law by reference to subject-matter is somewhat scanty. Otherwise, its value is beyond question, if some easy form of Jurisprudence be, as I have striven to show, the best commencement for a course of legal study.

E. C. Clark.

LIABILITY FOR THE TORTS OF AGENTS AND SERVANTS[1].

Command of principal does not excuse agent's wrong.

WHOEVER commits a wrong is liable for it himself. It is no excuse that he was acting, as an agent or servant, on behalf and for the benefit of another[2]. But that other may well be also liable: and in many cases a man is held answerable for wrongs not committed by himself. The rules of general application in this kind are those concerning the liability of a principal for his agent, and of a master for his servant. Under certain conditions responsibility goes farther, and a man may have to answer for wrongs which, as regards the immediate cause of the damage, are not those of either his agents or his servants. Thus we have cases where a man is subject to a positive duty, and is held liable for failure to perform it. Here, the absolute character of the duty being once established, the question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an 'independent contractor[3],' but whether the duty has been adequately performed or not. If it has, there is nothing more to be considered, and liability, if any, must be sought in some other quarter[4]. If not, the non-performance in itself, not the causes or conditions of non-performance, is the ground of liability. Special duties created by statute, as conditions attached to the grant of exceptional rights or otherwise, afford the chief examples of this kind. Here the liability attaches, irrespective of any question of agency or personal negligence, if and when the conditions imposed by the Legislature are not satisfied[5].

Cases of absolute positive duty distinguished:

There occur likewise, though as an exception, duties of this kind imposed by the common law. Such are the duties of common carriers, of owners of dangerous animals or other things involving, by their nature or position, special risk of harm to their neighbours; and such, to a limited extent, is the duty of occupiers of fixed property to have it in reasonably safe condition and repair, so far as that end can be assured by due care on the part not only of themselves and their servants, but of all concerned.

also duties in nature of warranty.

[1] A chapter from a forthcoming work, being the substance of lectures on the Law of Torts delivered in the Inns of Court.

[2] *Cullen* v. *Thomson's Trustees & Kerr*, 4 Macq. 424, 432: 'For the contract of agency or service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud,' or any other wrong.

[3] The distinction will be explained below.

[4] See *Hyams* v. *Webster*, Ex. Ch., L. R. 4 Q. B. 138 (1868).

[5] See *Gray* v. *Pullen*, Ex. Ch., 5 B. & S. 970; 34 L. J., Q. B. 265 (1864).

The degrees of responsibility may be thus arranged, beginning with the mildest:

(i) For oneself and specifically authorized agents (this holds always).

(ii) For servants or agents generally (limited to course of employment).

(iii) For both servants and independent contractors (duties as to safe repair, &c.).

(iv) For everything but *vis major* (exceptional: some cases of special risk, and, anomalously, certain public occupations).

Modes of liability for wrongful acts, &c. of others.

Apart from the cases of exceptional duty where the responsibility is in the nature of insurance or warranty, a man may be liable for another's wrong—

(1) as having authorized or ratified that particular wrong:

(2) as standing to the other person in a relation making him answerable for wrongs committed by that person in virtue of their relation, though not specifically authorized.

The former head presents little or no difficulty. The latter includes considerable difficulties of principle, and is often complicated with troublesome questions of fact.

Command and ratification.

It scarce needs authority to show that a man is liable for wrongful acts which have been done according to his express command or request, or which, having been done on his account and for his benefit, he has adopted as his own. This is not the less so because the person employed to do an unlawful act may be employed as an 'independent contractor,' so that, supposing it lawful, the employer would not be liable for his negligence about doing it. A gas company employed a firm of contractors to break open a public street, having therefor no lawful authority or excuse; the thing contracted to be done being in itself a public nuisance, the gas company was held liable for injury caused to a foot-passenger by falling over some of the earth and stones excavated and heaped up by the contractors[1]. A point of importance to be noted in this connexion is that only such acts bind a principal by subsequent ratification as were done at the time on the principal's behalf. What is done by the immediate actor on his own account cannot be effectually adopted by another; neither can an act done in the name and on behalf of Peter be ratified either for gain or for loss by John. 'Ratum quis habere non potest, quod ipsius nomine non est gestum[2].'

Master and servant.

The more general rule governing the other and more difficult branch of the subject was expressed by Willes J. in a judgment

[1] *Ellis* v. *Sheffield Gas Consumers Co.*, 2 E. & B. 767; 23 L. J., Q. B. 42 (1853).

[2] *Wilson* v. *Tumman*, 6 M. & G. 236 (1843), and Serjeant Manning's note, ib. 239.

which may now be regarded as a classical authority. 'The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved[1].'

Reason of the master's liability.

No reason for the rule, at any rate no satisfying one, is commonly given in our books. Its importance belongs altogether to the modern law, and it does not seem to be illustrated by any early authority[2]. Blackstone (i. 417) is short in his statement, and has no other reason to give than the fiction of an 'implied command.' It is currently said, *Respondeat superior*; which is a dogmatic statement, not an explanation. It is also said, *Qui facit per alium facit per se*; but this is in terms applicable only to authorized acts, not to acts that, although done by the agent or servant 'in the course of the service,' are specifically unauthorized or even forbidden. Again, it is said that a master ought to be careful in choosing fit servants; but if this were the reason, a master could discharge himself by showing that the servant for whose wrong he is sued was chosen by him with due care, and was in fact generally well conducted and competent: which is certainly not the law.

A better account was given by Chief Justice Shaw of Massachusetts. 'This rule,' he said, 'is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it[3].' This is, indeed, somewhat too widely expressed, for it does not in terms limit the responsibility to cases where at least negligence is proved. But no reader is likely to suppose that, as a general rule, either the servant or the master can be liable where there is no default at all. And the true principle is otherwise clearly enounced. I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.

Some time later the rule was put by Lord Cranworth in a not dissimilar form: the master 'is considered as bound to guarantee third persons against all hurt arising from the carelessness of

[1] *Barwick* v. *English Joint Stock Bank*, in Ex. Ch. (1867), L. R. 2 Ex. 259, 265. The point of the decision is that fraud is herein on the same footing as other wrongs: of which in due course.

[2] Joseph Brown, Q.C., in evidence before Select Committee on Employers' Liability, 1876, p. 38; Brett L.J., 1877, p. 114.

[3] *Farwell* v. *Boston & Worcester Railroad Corporation*, 4 Met. 49, and Bigelow, L. C. 688 (1842): the judgment is also reprinted in 3 Macq. 316. So too M. Sainctelette, the latest Continental writer on the subject, well says: 'La responsabilité du fait d'autrui n'est pas une fiction inventée par la loi positive. C'est une exigence de l'ordre social.' (De la Responsabilité et de la Garantie, p. 124.)

himself or of those acting under his orders in the course of his business[1].'

The statement of Willes J. that the master 'has put the agent in his place to do that class of acts' is also to be noted and remembered as a guide in many of the questions that arise. A just view seems to be taken, though artificially and obscurely expressed, in one of the earliest reported cases on this branch of the law: 'It shall be intended that the servant had authority from his master, it being for his master's benefit[2].'

Questions to be considered herein.

The rule, then (on whatever reason founded), being that a master is liable for the acts, neglects, and defaults of his servants in the course of the service, we have to define further—

1. Who is a servant.
2. What acts are deemed to be in the course of service.
3. How the rule is affected when the person injured is himself a servant of the same master.

Who is a servant: responsibility goes with order and control.

1. As to the first point, it is quite possible to do work for a man, in the popular sense, and even to be his agent for some purposes, without being his servant. The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or, as it has been put, 'retains the power of controlling the work[3];' and he who does work on those terms is in law a servant for whose acts, neglects, and defaults, to the extent to be specified, the master is liable. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand. For the acts or omissions of such an one about the performance of his undertaking his employer is not liable to strangers, no more than the buyer of goods is liable to a person who may be injured by the careless handling of them by the seller or his men in the course of delivery. If the contract, for example, is to build a wall, and the builder 'has a right to say to the employer, "I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end and not at the other;" there the relation of master and servant does not exist, and the employer is not liable[4].' 'In ascertaining who is liable for the act of a wrong-doer, you must

[1] *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 266, 283 (1858).
[2] *Turberville* v. *Stampe*, 1 Ld. Raym. 264 (end of 17th century).
[3] Crompton J., *Sadler* v. *Henlock*, 4 E. & B. 570, 578; 24 L. J., Q. B. 138, 141 (1855).
[4] Bramwell L.J., Emp. L. 77. p. 58: an extra-judicial statement, but made on an occasion of importance by a great master of the Common Law.

look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable[1].' He who controls the work is answerable for the workman; the remoter employer who does not control it is not answerable. This distinction is thoroughly settled in our law; the difficulties that may arise in applying it are difficulties of ascertaining the facts[2]. It may be a nice question whether a man has let out the whole of a given work to an 'independent contractor,' or reserved so much power of control as to leave him answerable for what is done[3].

Specific assumption of control.

It must be remembered that the remoter employer, if at any point he does interfere and assume specific control, renders himself answerable, not as master, but as principal. He makes himself 'dominus pro tempore.' Thus the hirer of a carriage, driven by a coachman who is not the hirer's servant but the letter's, is not, generally speaking, liable for harm done by the driver's negligence[4]. But if he orders, or by words or conduct at the time sanctions, a specific act of rash or careless driving, he may well be liable[5]. Rather slight evidence of personal interference has been allowed as sufficient in this class of cases[6].

Temporary transfer of service.

One material result of this principle is that a person who is habitually the servant of *A* may become, for a certain time and for the purpose of certain work, the servant of *B*; and this although the hand to pay him is still *A*'s. The owner of a vessel employs a stevedore to unload the cargo. The stevedore employs his own labourers; among other men, some of the ship's crew work for him by arrangement with the master, being like the others paid by the stevedore and under his orders. In the work of unloading these men are the servants of the stevedore, not of the owner[7].

Owners of a colliery, after partly sinking a shaft, agree with a contractor to finish the work for them, on the terms, among others, that engine power and engineers to work the engine are to be provided by the owners. The engine that has been used in excavating the shaft is handed over accordingly to the contractor: the same engineer remains in charge of it, and is still paid by the owners, but

[1] Willes J., *Murray* v. *Currie*, L. R., 6 C. P. 24, 27 (1870).

[2] One comparatively early case, *Bush* v. *Steinman*, 1 B. & P. 404, disregards the rule; but that case has been repeatedly commented on with disapproval, and is not now law. See the modern authorities well reviewed in *Hillard* v. *Richardson* (Sup. Ct., Mass., U. S. 1855), 3 Gray 349, and in Bigelow, L. C. Exactly the same distinction appears to be taken under the Code Napoléon in fixing the limits within which the very wide language of Art. 1384 is to be applied: Sainctelette, *op. cit.*, 127.

[3] *Pendlebury* v. *Greenhalgh*, C. A., 1 Q. B. D. 36, differing from the view of the same facts taken by the Court of Queen's Bench in *Taylor* v. *Greenhalgh*, L. R., 9 Q. B. 487.

[4] Even if the driver was selected by himself: *Quarman* v. *Burnett*, 6 M. & W. 499.

[5] *M^c Laughlin* v. *Pryor*, 4 M. & G. 48 (1842).

[6] Ib.; *Burgess* v. *Gray*, 1 C. B. 578. It is difficult in either case to see proof of more than adoption or acquiescence.

[7] *Murray* v. *Currie*, L. R., 6 C. P. 24 (1870).

is under the orders of the contractor. During the continuance of the work on these terms the engineer is the servant not of the colliery owners but of the contractor[1].

'Power of controlling the work' explained.

It is proper to add that the 'power of controlling the work' which is the legal criterion of the relation of a master to a servant does not necessarily mean a present and physical ability. Shipowners are answerable for the acts of the master, though done under circumstances in which it is impossible to communicate with the owners[2]. It is enough that the servant is bound to obey the master's directions if and when communicated to him. The legal power of control is to actual supervision what in the doctrine of possession *animus domini* is to physical detention. But this much is needful: therefore a compulsory pilot, who is in charge of the vessel independently of the owner's will, and, so far from being bound to obey the owner's or master's orders, supersedes the master for the time being, is not the owner's servant, and the statutory exemption of the owner from liability for such a pilot's acts is but in affirmance of the common law[3].

What is in course of employment.

2. Next we have to see what is meant by the course of service or employment. The injury in respect of which a master becomes subject to this kind of vicarious liability may be caused in the following ways:—

(*a*) It may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders.

(*b*) It may be due to the servant's want of care in carrying on the work or business in which he is employed. This is the commonest case.

(*c*) The servant's wrong may consist in excess or mistaken execution of a lawful authority.

(*d*) Or it may even be a wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes.

Let us take these heads in order.

Execution of specific orders.

(*a*) Here the servant is the master's agent in a proper sense, and the master is liable for that which he has truly, not by the fiction of a legal maxim, commanded to be done. He is also liable for the natural consequences of his orders, even though he wished to avoid them, and desired his servant to avoid them. Thus, in *Gregory* v. *Piper*[4], a right of way was disputed between adjacent occupiers, and

[1] *Rourke* v. *White Moss Colliery Co.*, C. A., 2 C. P. D. 205.
[2] See Maude and Pollock, Merchant Shipping, i. 158, 4th ed.
[3] Merchant Shipping Act, 1854, s. 388; *The Halley*, L. R., 2 P. C., at p. 201. And see Marsden on Collisions at Sea, ch. 5.
[4] 9 B. & C. 591 (1829).

the one who resisted the claim ordered a labourer to lay down rubbish to obstruct the way, but so as not to touch the other's wall. The labourer executed the orders as nearly as he could, and laid the rubbish some distance from the wall, but it soon 'shingled down' and ran against the wall, and in fact could not by any ordinary care have been prevented from doing so. For this the employer was held to answer as for a trespass which he had authorized. This is a matter of general principle, not of any special kind of liability. No man can authorize a thing and at the same time affect to disavow its natural consequences; no more than he can disclaim responsibility for the natural consequences of what he does himself.

Negligence in conduct of master's business.

(*b*) Then comes the case of the servant's negligence in the performance of his duty, or rather while he is about his master's business. What constitutes negligence does not just now concern us; but it must be established that the servant is a wrong-doer, and liable to the plaintiff, before any question of the master's liability can be entertained. Assuming this to be made out, the question may occur whether the servant was in truth on his master's business at the time, or engaged on some pursuit of his own. In the latter case the master is not liable. 'If the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of his servant in doing it[1].' For example: 'If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, ... the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment[2].'

Departure or deviation from master's business.

Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome. Distinctions are suggested by some of the reported cases which are almost too fine to be acceptable. The principle, however, is intelligible and rational. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be

[1] Maule J., *Mitchell* v. *Crasweller*, 13 C. B. 237; 22 L. J., C. P. 100 (1853).
[2] *Croft* v. *Alison*, 4 B. & A. 590 (1821).

'on a frolic of his own[1],' the master is no longer answerable for the servant's conduct. Two modern cases of the same class and period, one on either side of the line, will illustrate this distinction.

Whatman v. Pearson.

In *Whatman* v. *Pearson*[2], a carter who was employed by a contractor, having the allowance of an hour's time for dinner in his day's work, but also having orders not to leave his horse and cart, or the place where he was employed, happened to live hard by. Contrary to his instructions, he went home to dinner and left the horse and cart unattended at his door; the horse ran away and did damage to the plaintiff's railings. A jury was held warranted in finding that the carman was throughout in the course of his employment as the contractor's servant 'acting within the general scope of his authority to conduct the horse and cart during the day[3].'

Storey v. Ashton.

In *Storey* v. *Ashton*[4], a carman was returning to his employer's office with returned empties. A clerk of the same employer's who was with him induced him, when he was near home, to turn off in another direction to call at a house and pick up something for the clerk. While the carman was driving in this direction he ran over the plaintiff. The Court held that if the carman 'had been merely going a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-servant's account, and could not in any way be said to be carrying out his master's employment[5].' More lately it has been held that if the servant begins using his master's property for purposes of his own, the fact that by way of afterthought he does something for his master's purposes also is not necessarily such a 're-entering upon his ordinary duties' as to make the master answerable for him. A journey undertaken on the servant's own account 'cannot by the mere fact of the man making a pretence of duty by stopping on his way be converted into a journey made in the course of his employment[6].'

Williams v. Jones.

The following is a curious example. A carpenter was employed by A with B's permission to work for him in a shed belonging to B. This carpenter set fire to the shed in lighting his pipe with a

[1] Parke B., *Joel* v. *Morison*, 6 C. & P. 503 (1834): a nisi prius case, but often cited with approval: see *Burns* v. *Poulsom*, L. R., 8 C. P. at p. 567.

[2] L. R., 3 C. P. 422 (1868).

[3] Byles J., at p. 425.

[4] L. R., 4 Q. B. 476 (1869); *Mitchell* v. *Crassweller*, cited above, was a very similar case.

[5] Lush J., at p. 480. It was 'an entirely new and independent journey, which had nothing at all to do with his employment:' Cockburn C.J., 'Every step he drove was away from his duty:' Mellor J., ibid. But it could have made no difference if the accident had happened as he was coming back. See the next case.

[6] *Rayner* v. *Mitchell*, 2 C. P. D. 357.

shaving. His act, though negligent, having nothing to do with the purpose of his employment, A was not liable to B[1]. It does not seem difficult to pronounce that lighting a pipe is not in the course of a carpenter's employment; but the case was one of difficulty as being complicated by the argument that A, having obtained a gratuitous loan of the shed for his own purposes, was answerable, without regard to the relation of master and servant, for the conduct of persons using it. This failed for want of anything to show that A had acquired the exclusive use or control of the shed. Apart from this, the facts come very near to the case which has been suggested, but not dealt with by the Courts in any reported decision, of a miner opening his safety-lamp to get a light for his pipe, and thereby causing an explosion: where 'it seems clear that the employer would not be held liable[2].'

Excess or mistake in execution of authority.

(*c*) Another kind of wrong which may be done by a servant in his master's business, and so as to make the master liable, is the excessive or erroneous execution of a lawful authority. To establish a right of action against the master in such a case it must be shown that (*a*) the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do; (*β*) the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful.

The master is chargeable only for acts of an authorized class which in the particular instance are wrongful by reason of excess or mistake on the servant's part. For acts which he has neither authorized in kind nor sanctioned in particular he is not chargeable.

Interference with passengers by guards, &c.

Most of the cases on this head have arisen out of acts of railway servants on behalf of the companies. A porter whose duty is, among other things, to see that passengers do not get into wrong trains or carriages (but not to remove them from a wrong carriage), asks a passenger who has just taken his seat where he is going. The passenger answers, 'To Macclesfield.' The porter, thinking the passenger is in the wrong train, pulls him out; but the train was in fact going to Macclesfield, and the passenger was right. On these facts a jury may well find that the porter was acting within his general authority so as to make the company liable[3]. Here are both error and excess in the servant's action: error in supposing facts to exist which make it proper to use his authority (namely, that the passenger has got into the wrong train); excess in the

[1] *Williams* v. *Jones*, Ex. Ch., 3 H. & C. 256, 602; 33 L. J., Ex. 297 (1865); diss. Mellor and Blackburn JJ.

[2] R. S. Wright, Emp. L. 76. p. 47.

[3] *Bayley* v. *Manchester, Sheffield, & Lincolnshire Railway Co.*, L. R., 7 C. P. 415, in Ex. Ch., 8 C. P. 148 (1872-3).

manner of executing his authority, even had the facts been as he supposed. But they do not exclude the master's liability.

'A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held responsible for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment[1].'

Seymour v. *Greenwood*[2] is another illustrative case of this class. The guard of an omnibus removed a passenger whom he thought it proper to remove as being drunken and offensive to the other passengers, and in so doing used excessive violence. Even if he were altogether mistaken as to the conduct and condition of the passenger thus removed, the owner of the omnibus was answerable. 'The master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself.'

Arrest of supposed offenders.

Another kind of case under this head is where a servant takes on himself to arrest a supposed offender on his employer's behalf. Here it must be shown, both that the arrest would have been justified if the offence had really been committed by the party arrested, and that to make such an arrest was within the employment of the servant who made it. As to the latter point, however, 'where there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority is *prima facie* evidence that he had authority[3].' Railway companies have accordingly been held liable for wrongful arrests made by their inspectors or other officers as for attempted frauds on the company punishable under statutes or authorized by-laws, and the like[4].

Act wholly outside authority, master not liable.

But the master is not answerable if the servant takes on himself, though in good faith and meaning to further the master's interest, that which the master has no right to do even if the facts were as the servant thinks them to be: as where a station-master arrested a passenger for refusing to pay for the carriage of a horse, a thing outside the company's powers[5]. The same rule holds if the par-

[1] Per Willes J., *Bayley* v. *Manchester, Sheffield, & Lincolnshire Ry. Co.*, L.R., 7 C.P. 415.
[2] 7 H. & N. 355: 30 L. J., Ex. 189, 327, Ex. Ch. (1861).
[3] Blackburn J., *Moore* v. *Metrop. Ry. Co.*, L. R., 8 Q. B. 36, 39.
[4] Ib., following *Goff* v. *Gt. N. Ry. Co.*, 3 E. & E. 672; 30 L. J., Q. B. 148 (1861).
[5] *Poulton* v. *L. & S. W. Ry. Co.*, L. R., 2 Q. B. 534.

ticular servant's act is plainly beyond his authority, as where the officer in charge of a railway station arrests a man on suspicion of stealing the company's goods, an act which is not part of the company's general business nor for their apparent benefit[1]. In a case not clear on the face of it, as where a bank manager commences a prosecution, which turns out to be groundless, for a supposed theft of the bank's property—a matter not within the ordinary routine of banking business, but which might in the particular case be within the manager's authority—the extent of the servant's authority is a question of fact[2]. Much must depend on the nature of the matter in which the authority is given. Thus an agent intrusted with general and ample powers for the management of a farm has been held to be clearly outside the scope of his authority in entering on the adjacent owner's land on the other side of a boundary ditch in order to cut underwood which was choking the ditch and hindering the drainage from the farm. If he had done something on his employer's own land which was an actionable injury to adjacent land, the employers might have been liable. But it was thought unwarrantable to say 'that an agent intrusted with authority to be exercised over a particular piece of land has authority to commit a trespass on other land[3].'

(*d*) Lastly, a master may be liable even for wilful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes: and this, no less than in other cases, although the servant's conduct is of a kind actually forbidden by the master. Sometimes it has been said that a master is not liable for the 'wilful and malicious' wrong of his servant. If 'malicious' means 'committed exclusively for the servant's private ends,' or 'malice' means 'private spite[4],' this is a correct statement; otherwise it is contrary to modern authority. The question is not what was the nature of the act in itself, but whether the servant intended to act in the master's interest.

Wilful trespasses, &c. for master's purposes.

This was decided by the Exchequer Chamber in *Limpus* v. *London General Omnibus Company*[5], where the defendant company's driver had obstructed the plaintiff's omnibus by pulling across the road in front of it, and caused it to upset. He had printed instructions not to race with or obstruct other omnibuses. Martin B. directed the jury, in effect, that if the driver acted in the way of his employment and in the supposed interest of his employers as against a rival

[1] *Edwards* v. *L. & N. W. Ry. Co.*, L. R., 5 C. P. 445; cp. *Allen* v. *L. & S. W. Ry. Co.*, L. R., 6 Q. B. 65.
[2] *Bank of New South Wales* v. *Owston* (J. C.), 4 App. Ca. 270.
[3] *Bolingbroke* v. *Swindon Local Board*, L. R., 9 C. P. 575 (1874).
[4] See per Blackburn J., 1 H. & C. 543.
[5] 1 H. & C. 526; 32 L. J., Ex. (1862). This and *Seymour* v. *Greenwood* (above) overrule *M'Manus* v. *Crickett*, 1 East, 106.

in their business, the employers were answerable for his conduct, but they were not answerable if he acted only for some purpose of his own: and this was approved by the Court[1] above. The driver 'was employed not only to drive the omnibus, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with his employment, when explained by his desire to get before the other omnibus.' As to the company's instructions, 'the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability[2].'

Fraud of agent or servant.

That an employer is liable for frauds of his servant committed without authority, but in the course of the service and for the employer's purposes, was established with more difficulty; for it seemed harsh to impute deceit to a man personally innocent of it, or (as in the decisive cases) to a corporation, which, not being a natural person, is incapable of personal wrong-doing[3]. But when it was fully realized that in all these cases the master's liability is imposed by the policy of the law without regard to personal default on his part, so that his express command or privity need not be shown, it was a necessary consequence that fraud should be on the same footing as any other wrong[4]. So the matter is handled in our leading authority, the judgment of the Exchequer Chamber delivered by Willes J. in *Barwick* v. *English Joint Stock Bank.*

'With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong[5].'

This has been more than once fully approved in the Privy Council[6], and may now be taken, notwithstanding certain appearances of conflict[7], to have the approval of the House of Lords also[8]. What has been said to the contrary was either extra-judicial, as going beyond the *ratio decidendi* of the House, or is to be accepted as limited to the particular case where a member of an incorporated company, not having ceased to be a member, seeks to charge the

[1] Williams, Crompton, Willes, Byles, Blackburn JJ., diss. Wightman J.

[2] Willes J., 1 H. & C., at p. 539.

[3] This particular difficulty is fallacious. It is in truth neither more nor less easy to think of a corporation as deceiving (or being deceived) than as having a consenting mind. In no case can a corporation be invested with either rights or duties except through natural persons who are its agents.

[4] It makes no difference if the fraud includes a forgery: *Shaw* v. *Port Philip Gold Mining Co.*, 13 Q. B. D. 103.

[5] L. R., 2 Ex. at p. 265.

[6] *Mackay* v. *Commercial Bank of New Brunswick*, L. R., 5 P. C. 412 (1874); *Swire* v. *Francis*, 3 App. Ca. 106 (1877).

[7] *Addie* v. *Western Bank of Scotland*, L. R., 1 Sc. & D. 145, dicta at pp. 158, 166, 167.

[8] *Houldsworth* v. *City of Glasgow Bank*, 5 App. Ca. 317.

company with the fraud of its directors or other agents in inducing him to join it[1].

The leading case of *Mersey Docks Trustees* v. *Gibbs*[2] may also be referred to in this connexion, as illustrating the general principles according to which liabilities are imposed on corporations and public bodies.

Liability of firm for fraud of a partner.

There is abundant authority in partnership law to show that a firm is answerable for fraudulent misappropriation of funds, and the like, committed by one of the partners in the course of the firm's business and within the scope of his usual authority, though no benefit be derived therefrom by the other partners. But, agreeably to the principles above stated, the firm is not liable if the transaction undertaken by the defaulting partner is outside the course of partnership business. Where, for example, one of a firm of solicitors receives money to be placed in a specified investment, the firm must answer for his application of it, but not, as a rule, if he receives it with general instructions to invest it for the client at his own discretion[3]. Again, the firm is not liable if the facts show that exclusive credit was given to the actual wrong-doer[4]. In all these cases the wrong is evidently wilful. In all or most of them, however, it is at the same time a breach of contract or trust. And it seems to be on this ground that the firm is held liable even when the defaulting partner, though professing to act on behalf of the firm, misapplies funds or securities merely for his own separate gain. The reasons given are not always free from admixture of the Protean doctrine of 'making representations good,' which is now, I venture to think, exploded[5].

Injuries to servants by fault of fellow-servants.

3. There remains to be considered the modification of a master's liability for the wrongful act, neglect, or default of his servant when the person injured is himself in and about the same master's service. It is a topic far from clear in principle; the Employers' Liability Act, 1880, has obscurely indicated a sort of counter

[1] Ib., Lord Selborne at p. 326, Lord Hatherley at p. 331; Lord Blackburn's language at p. 339 is more cautious, perhaps for the very reason that he was a party to the decision of *Barwick* v. *English Joint Stock Bank*. Shortly, the shareholder is in this dilemma: while he is a member of the company, he is damnified by the alleged deceit, if at all, solely in that he is liable as a shareholder to contribute to the company's debts: this liability being of the essence of a shareholder's position, claiming compensation from the company for it involves him in a new liability to contribute to that compensation itself, which is an absurd circuity. But if his liability as a shareholder has ceased, he is no longer damnified. Therefore restitution only (by rescission of his contract), not compensation, is the shareholder's remedy as against the company: though the fraudulent agent remains personally liable.

[2] L. R., 1 H. L. 93 (1864-6).

[3] Cp. *Blair* v. *Bromley*, 2 Ph. 354, and *Cleather* v. *Twisden*, 24 Ch. D. 731, with *Harman* v. *Johnson*, 2 E. & B. 61.

[4] *Ex parte Eyre*, 1 Ph. 227. See more illustrations in my 'Digest of the Law of Partnership,' art. 24.

[5] I have discussed it in Appendix L. to 'Principles of Contract,' 3rd ed. (N. in 4th ed.) See now *Maddison* v. *Alderson*, 8 App. Ca., at p. 473.

principle, and introduced a number of minute and empirical exceptions, or rather limitations of the exceptional rule in question. That rule, as it stood before the Act of 1880, is that a master is not liable to his servant for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service. Our law can show no more curious instance of a rapid modern development. The first evidence of any such rule is in *Priestley* v. *Fowler*[1], decided in 1837, which proceeds on the theory (if on any definite theory) that the master 'cannot be bound to take more care of the servant than he may reasonably be expected to do of himself;' that a servant has better opportunities than his master of watching and controlling the conduct of his fellow-servants; and that a contrary doctrine would lead to intolerable inconvenience, and encourage servants to be negligent. According to this there would be a sort of presumption that the servant suffered to some extent by want of diligence on his own part. But it is needless to pursue this reasoning; for the like result was a few years afterwards arrived at by Chief Justice Shaw of Massachusetts by another way, and in a judgment which is the fountain-head of all the later decisions[2]. The accepted doctrine is to this effect. Strangers can hold the master liable for the negligence of a servant about his business. But in the case where the person injured is himself a servant in the same business, he is not in the same position as a stranger. He has of his free will entered into the business and made it his own. He cannot say to the master, You shall so conduct your business as not to injure me by want of due care and caution therein. For he has agreed with the master to serve in that business, and his claims on the master depend on the contract of service. Why should it be an implied term of that contract, not being an express one, that the master shall indemnify him against the negligence of a fellow-servant, or any other current risk? It is rather to be implied that he contracted with the risk before his eyes, and that the dangers of the service, taken all round, were considered in fixing the rate of payment. This is, I believe, a fair summary of the reasoning which has prevailed in the authorities. With its soundness we are not here concerned. It was not only adopted by the House of Lords for England, but forced by them upon the reluctant Courts of Scotland to make the jurisprudence of the two countries uniform[3]. No such doctrine appears to exist in the law of any other country in Europe.

Common law rule of master's immunity.

Reason given in the later cases.

[1] 3 M. & W. 1. All the case actually decided was that a master does not warrant to his servant the sufficiency and safety of a carriage in which he sends him out.

[2] *Farwell* v. *Boston & Worcester Railroad Corporation*, 4 Met. 49.

[3] See *Wilson* v. *Merry*, L. R., 1 Sc. & D. 326.

The following is a clear judicial statement of it in its settled form: 'A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both[1].'

The servants need not be about the same kind of work:

The phrase 'common employment' is frequent in this class of cases. But it is misleading in that it suggests a limitation of the rule to circumstances where the injured servant had in fact some opportunity of observing and guarding against the conduct of the negligent one; a limitation rejected by the Massachusetts Court in Farwell's case, where an engine-driver was injured by the negligence of a switchman (pointsman, as we say on English railways) in the same company's service, and afterwards constantly rejected by the English Courts.

'When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight or voice, and yet acting together.

'Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied[2].'

[1] Erle C.J. in *Tunney* v. *Midland Ry. Co.*, L. R., 1 C. P., at p. 296 (1866); Archibald J. used very similar language in *Lovell* v. *Howell* (1876), 1 C. P. D., at p. 167.

[2] Shaw C.J., *Farwell* v. *Boston, &c. Corporation*, 4 Met. 49. M. Sainctelette of Brussels, and M. Sauzet of Lyons, whom he quotes (*op. cit.* p. 140), differ from the

provided there is a general common object.

So it has been said that 'we must not over-refine, but look at the common object, and not at the common immediate object[1].' All persons engaged under the same employer for the purposes of the same business, however different in detail those purposes may be, are fellow-servants in a common employment within the meaning of this rule: for example, a carpenter doing work on the roof of an engine-shed and porters moving an engine on a turn-table[1]. 'Where there is one common general object, in attaining which a servant is exposed to risk, he is not entitled to sue the master if he is injured by the negligence of another servant whilst engaged in furthering the same object[2].'

Relative rank of the servants immaterial.

It makes no difference if the servant by whose negligence another is injured is a foreman, manager, or other superior in the same employment, whose orders the other was by the terms of his service bound to obey. The foreman or manager is only a servant having greater authority: foreman and workmen, of whatever rank, and however authority and duty may be distributed among them, are 'all links in the same chain[3].' The master is bound, as between himself and his servants, to exercise due care in selecting proper and competent persons for the work (whether as fellow-workmen in the ordinary sense, or as superintendents or foremen), and to furnish suitable means and resources to accomplish the work[4], and he is not answerable further[5].

Volunteer assistant is on same

Moreover, a stranger who gives his help without reward to a man's servants engaged in any work is held to put himself, as

current view among French-speaking lawyers, and agree with Shaw C.J. and our Courts, in referring the whole matter to the contract between the master and servant; but they arrive at the widely different result of holding the master bound, as an implied term of the contract, to insure the servant against all accidents in the course of the service, and not due to the servant's own fault or *vis major*.

[1] Pollock C.B., *Morgan* v. *Vale of Neath Ry. Co.*, Ex. Ch., L. R., 1 Ex. 149, 155 (1865).

[2] Thesiger L.J., *Charles* v. *Taylor*, 3 C. P. D. 492, 498.

[3] *Feltham* v. *England*, L. R., 2 Q. B. 33 (1866); *Wilson* v. *Merry*, L. R., 1 Sc. & D. 326 (1868): see per Lord Cairns at p. 333, and per Lord Colonsay at p. 345. The French word *collaborateur*, which does not mean 'fellow-workman' at all, was at one time absurdly introduced into these cases, it is believed by Lord Brougham, and occurs as late as *Wilson* v. *Merry*.

[4] According to some decisions, which seem on principle doubtful, he is bound only not to furnish means or resources which are to his own knowledge defective: *Gallagher* v. *Piper*, 16 C. B., N. S. 669; 33 L. J., C. P. 329 (1864). And quite lately it has been decided in the Court of Appeal that where a servant seeks to hold his master liable for injury caused by the dangerous condition of a building where he is employed, he must allege distinctly both that the master knew of the danger and that he, the servant, was ignorant of it: *Griffiths* v. *London & St. Katharine's Dock Co.*, 13 Q. B. D. 259.

[5] Lord Cairns, as above: to same effect Lord Wensleydale, *Weems* v. *Mathieson*, 4 Macq., at p. 227 (1861): 'All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen in a fit and proper manner.' In *Skipp* v. *E. C. Ry. Co.*, 9 Ex. 223; 23 L. J., Ex. 23 (1853), it was said that this duty does not extend to having a sufficient number of servants for the work: *sed qu.* The decision was partly on the ground that the plaintiff was in fact well acquainted with the risk and had never made any complaint.

regards the master's liability towards him, in the same position as if he were a servant. Having of his free will (though not under a contract of service) exposed himself to the ordinary risks of the work and made himself a partaker in them, he is not entitled to be indemnified against them by the master any more than if he were in his regular employment[1]. footing as servant.

On the other hand, a master who takes an active part in his own work is not only himself liable to a servant injured by his negligence, but, if he has partners in the business, makes them liable also. For he is the agent of the firm, but not a servant[2]: the partners are generally answerable for his conduct, yet cannot say he was a fellow-servant of the injured man. Exception where the master interferes in person.

Such were the results arrived at by a number of modern authorities, which it seems useless to cite in more detail[3]: the rule, though not abrogated, being greatly limited in application by the statute of 1880. This Act (43 & 44 Vict. c. 42) is on the face of it an experimental and empirical compromise between conflicting interests. It is temporary, being enacted only for seven years and the next session of Parliament; it is confined in its operation to certain specified causes of injury; and only certain kinds of servants are entitled to the benefit of it, and then upon restrictive conditions as to notice of action, mode of trial, and amount of compensation, which are unknown to the common law. The effect is that a 'workman' within the meaning of the Act is put as against his employer in approximately (not altogether, I think) the same position as an outsider as regards the safe and fit condition of the material instruments, fixed or moveable, of the master's business. He is also entitled to compensation for harm incurred through the negligence of another servant exercising superintendence, or by the effect of specific orders or rules issued by the master or some one representing him; and there is a special wider provision for the benefit of railway servants, which virtually abolishes the master's immunity as to railway accidents in the ordinary sense of that term. So far as the Act has any principle, it is that of holding the employer answerable for the conduct of those who are in delegated authority under him. It is noticeable that almost all the litigation upon the Act has been caused either by its minute provisions as to notice of action, or by desperate attempts to evade those parts of its language which are plain enough to common sense. Employers' Liability Act, 1880.

[1] *Potter* v. *Faulkner*, Ex. Ch., 1 B. & S. 800; 31 L. J., Q. B. 30 (1861), approving *Degg* v. *Midland Ry. Co.*, 1 H. & N. 773; 26 L. J., Ex. 174 (1857).

[2] *Ashworth* v. *Stanwix*, 3 E. & E. 701; 30 L. J., Q. B. 183 (1861).

[3] They are well collected by Mr. Horace Smith (Law of Negligence, pp. 73-76, 2nd ed.).

Resulting complication of the law.

On the whole we have, in a matter of general public importance and affecting large classes of persons who are neither learned in the law nor well able to procure learned advice, the following singularly intricate and clumsy state of things.

First, there is the general rule of a master's liability for his servants (itself in some sense an exceptional rule to begin with).

Secondly, the immunity of the master where the person injured is also his servant.

Thirdly, in the words of the marginal notes of the Employers' Liability Act, 'amendment of law' by a series of elaborate exceptions to that immunity.

Fourthly, 'exceptions to amendment of law' by provisoes which are mostly but not wholly re-statements of the common law.

Fifthly, minute and vexatious regulations as to procedure in the cases within the first set of exceptions.

It is incredible that such a state of things should nowadays be permanently accepted either in substance or in form. This however is not the place to discuss the principles of the controversy, which I have attempted to do elsewhere[1]. It does not appear that any similar controversy has taken place in the United States, where the doctrine laid down by the Supreme Court of Massachusetts in Farwell's case has been very generally followed. Except in Massachusetts, however, an employer does not so easily avoid responsibility by delegating his authority, as to choice of servants or otherwise, to an intermediate superintendent[2].

FREDERICK POLLOCK.

[1] Essays in Jurisprudence and Ethics (1882), ch. 5. See for very full information and discussion on the whole matter the evidence taken by the Select Committees of the House of Commons in 1876 and 1877 (Parl. Papers, H. C., 1876, 372; 1877, 285).

[2] Cooley on Torts, 560; Shearman and Redfield, ss. 86, 88, 102. And see the late case of *Chicago M. & S. Ry. Co.* v. *Ross*, in the Supreme Court, U.S., Washington Law Reporter, Dec. 20, 1884.

NOTES INÉDITES DE BENTHAM SUR LE DROIT INTERNATIONAL.

DANS l'édition des *Œuvres* de Bentham que M. John Bowring, son exécuteur testamentaire, publia en 1843, figurent sous le titre de *Principles of international Law*, quatre essais traitant successivement des buts du droit international, des sujets ou de l'étendue personnelle des lois d'un Etat, de la guerre envisagée dans ses causes et dans ses effets, enfin d'un projet de paix universelle et perpétuelle.

Les manuscrits d'après lesquels ces fragments furent imprimés datent de 1786 à 1789. A cette époque, Bentham était dans toute la vigueur de son talent et de son génie. Le *Fragment sur le gouvernement* et la *Défense de l'usure* l'avaient rendu célèbre, et il était à la veille de publier l'*Introduction aux principes de la morale et de la législation*. Le principe de l'utilité n'avait pas encore trouvé sa formule définitive: 'Le plus grand bonheur du plus grand nombre;' mais l'idée même avait germé depuis longtemps; elle s'était développée, et, féconde, elle produisait déjà ses fruits.

Dans les *Essais* dont nous parlons, Bentham demande quel but se proposerait un citoyen du monde s'il s'était chargé de rédiger un code du droit des gens universel.

D'après lui, ce but serait l'utilité commune de toutes les nations, dont les droits et les devoirs se résument en ceci: ne faire aucun mal aux autres nations, leur faire le plus grand bien; ne souffrir d'elles aucun dommage, en recevoir le plus grand bien.

En cas de violation de ces droits et de non-observation de ces devoirs, Bentham permet de chercher satisfaction dans la guerre; seulement il enseigne qu'un code international devrait créer des arrangements tels que la guerre produise le moins de mal possible. Dans un autre de ses écrits, il considère la guerre comme une espèce de procédure par laquelle on cherche de part et d'autre à se mettre en possession des avantages, qu'on s'est respectivement adjugés. Cette idée se trouve également ici et dans le code international, les lois de la paix formeront le droit substantif, tandis que les lois de la guerre seront le droit adjectif.

Aux causes diverses de guerre le célèbre jurisconsulte oppose quatre remèdes: la codification des lois non-écrites déjà établies par l'usage, la conclusion de conventions sur tous les points indéterminés, le perfectionnement du style des lois et des actes, et le projet de paix perpétuelle.

Le projet de paix perpétuelle s'appuie sur une double proposition,

la réduction des forces militaires des puissances européennes et l'émancipation des colonies, et il comprend l'établissement d'un tribunal arbitre ou congrès composé de deux délégués par puissance. Le tribunal aurait divers pouvoirs; il prononcerait sa décision et la ferait publier, dans les territoires des Etats en cause; il mettrait éventuellement l'Etat réfractaire au ban de l'Europe; enfin, mode d'action suprême, il fixerait le contingent que les Etats auraient à fournir pour exécuter ses sentences. S'il faut en croire Bentham, cette dernière nécessité ne se présenterait même pas. Il suffirait pour l'éviter d'accorder au congrès la faculté de donner la plus grande publicité à ses jugements motivés.

Telle est dans ses lignes générales la substance des *Principles of international law*. Ceux-ci ne virent le jour qu'après la mort de leur auteur; chose étonnante, dans les nombreux écrits parus de son vivant, Bentham qui semblait fait pour l'étude des lois gouvernant les rapports des Etats, ne touche qu'accessoirement à cette matière importante. A première vue cependant il semble impossible que le droit des gens n'ait point occupé son esprit durant les longues années d'admirable activité qu'il lui fut donné de consacrer à la science juridique, et l'on se demande si ici encore, de véritables trésors ne sont pas demeurés enfouis dans ses innombrables notes manuscrites et si le monde n'a pas à déplorer sous ce rapport d'irréparables pertes. Nous sommes malheureusement réduits à faire sur ce point des conjectures; mais un fait résulte au moins d'une liasse de lettres qui reposent au British Museum, c'est qu'au déclin de sa noble vie, à l'âge de près de quatre-vingts ans, Bentham avait repris l'examen de l'objet qui l'avait intéressé en 1786. Ces lettres sont adressées à Jabez Henry et s'espacent entre juillet 1827 et janvier 1830[1].

Après avoir occupé des fonctions judiciaires à Corfou et aux Îles Ioniennes et présidé la cour de Demerara et Essequebo, Jabez Henry s'était fixé à Londres où nous le trouvons comme barrister-at-law de Middle Temple. En 1821, il avait publié une étude sur le droit criminel en vigueur dans la Guyane anglaise, et en 1823, il avait écrit au sujet d'un arrêt de la cour de Demerara, un livre qui lui fait une place honorable parmi les auteurs de droit international privé[2]. Bowring le mit en rapport avec Bentham et par une première lettre du 30 juillet 1827, ce dernier l'invite à lui faire visite[3]. Des lettres subséquentes de Bentham lui-même, de

[1] Add. MS. no. 30,151.

[2] Alphonse Rivier, 'Eléments de Droit International Privé,' d'Asser, p. 274.

[3] 'Sir, 'Queen's Square Place, Westminster, 30 July, 1827.

'Our common friend, Bowring, has had for some time past in his busy head a scheme for bringing us together; and for this purpose he has been labouring to make me believe that on your part inclination for such a meeting is not wanting. On my part a reciprocal

Bowring, ou du secrétaire de Bentham témoignent de relations assez suivies; c'est ainsi que Bentham, toujours préoccupé de la rédaction de ses codes, demande à Henry un exemplaire du code Ionien; c'est ainsi aussi que nous le voyons emprunter à son ami les Commentaires du chancelier Kent, dont le premier volume venait de paraître en 1826.

Au commencement de 1829, Henry s'adresse au secrétaire de Bentham à l'effet d'obtenir communication de quelques notes manuscrites de ce dernier; une première fois, on lui répond que le 'Vénérable Législateur,' comme ses amis et ses admirateurs se plaisaient à l'appeler, est trop occupé en ce moment, mais bientôt il est déféré au désir exprimé, et Henry reçoit copie d'un certain nombre de feuillets relatifs au droit international; Bentham s'est donné la peine de collationner la transcription et de corriger le texte de sa main. Ce sont ces notes que nous examinerons rapidement.

Un premier feuillet comprend huit articles qui méritent d'être reproduits in-extenso:—

'Art. 1. The political States concerned in the establishment of the present all-comprehensive International Code are those which follow.

☞ Here enumerate them in alphabetical order to avoid the assumption of superiority from precedence in the order of enumeration.

'Art. 2. The equality of all is hereby recognised by all.

'Art. 3. Each has its own form of government; each respects the form of government of every other.

'Art. 4. Each has its own opinions and enactments on the subject of religion; each respects that of every other.

'Art. 5. Each has its own manners, customs and opinions; each respects the manners, customs and opinions of every other.

'Art. 6. This Confederation, with the Code of international Law

wish to make acquaintance with a gentleman of whose disposition, added to the power of doing what I myself should call good, and that upon a very extensive scale, such favourable reports have reached me, is what he might venture to assure you of without fear of being contradicted. The only hours I can afford to abstract from my unceasing labours are the convivial ones. The earliest day I have free is Thursday next. On that day, if you can put up for once with a Hermit's dinner, the Hermitage will open itself to you with unfeigned pleasure. At half-past six the dinner finds its way to the table: but as this place has some particularities in it by which considerable interest is commonly excited, a quarter of an hour may perhaps be not unpleasantly employed in the observation of them.

'Should this find you engaged for Thursday, I have still Friday free, and should with pleasure dispose of it in the same manner.

'I am, Sir, yours, sincerely,

'J. Henry, Esq., &c. &c. &c. 'JEREMY BENTHAM.'

'P.S. The gate in the iron railing to the garden bounded by the Barracks in the Birdcage Walk opens into a walk which, through a higher iron gate, will conduct you to the house; they will be left open for your reception, and save you from the approach by a dark lane that leads to it from the Broadway.'

approved, adopted and sanctioned by it, has for its objects, or say ends, in view the preservation, not only of peace (in the sense in which by peace is meant absence of war), but of mutual good-will and consequent mutual good offices between all the several members of this confederation.

'Art. 7. The means by which it aims at the attainment of this so desirable end—and the effectuation of this universally desirable purpose—is the adjustment and preappointed definition of all rights and obligations that present themselves as liable and likely to come into question: to do this at a time when no state having any interest in the question more than any other has, the several points may be adjusted by common consent of all, without any such feeling as that of disappointment, humiliation or sacrifice on the part of any: adjusted at a time when no detriment to self-regarding interest, on the part of any having or by the part of any supposed to have place, no such cause of antisocial affection will have place in any of the breasts concerned.

'Art. 8. Of each of these several confederating States the government can do no otherwise than desire to be regarded as persuaded that its own form of government is in its nature, in a higher degree than any other, conducive to the greatest happiness of the whole number of the members of the community of which it is the government: and by this declaration it means not to contest the fitness of any other for governing in the community in which it bears rule.'

Il s'agit, on le voit, d'un véritable titre préliminaire du code international projeté par l'illustre jurisconsulte. Nous ne nous arrêterons pas à le discuter; mais il est quelques observations que nous croyons utile de faire. Un premier point intéressant à noter, c'est que dès le début son esprit essentiellement logique, nullement historique, se trahit et s'affirme. L'égalité des Etats est proclamée à l'égal d'un dogme; Bentham voit en elle la pierre angulaire de l'édifice international. Or, il est facile de toucher ici du doigt l'influence de l'Ecole dont Jean Jacques Rousseau fut l'éloquent interprète. L'égalité des hommes, article formel de la foi des écrivains du XVIII[e] siècle, a dû confirmer les juristes dans l'idée de l'égalité des Etats, et au fond de l'une et de l'autre maxime se trouve évidemment la croyance à un droit de la nature. Il est une autre remarque que suggère la lecture des notes que nous venons de reproduire. Bentham applique, *mutatis mutandis*, les principes émis dans sa *Déontologie*. L'idée inscrite dans l'article 6 est, d'autre part, une réminiscence des Essais de 1786. Là, l'auteur développait sa pensée d'une façon saisissante: 'Le législateur, disait-il, doit chercher à empêcher les délits internationaux et à encourager les actions utiles

entre les peuples. Il doit regarder comme un crime positif chaque action par laquelle une nation ferait plus de mal aux nations étrangères réunies dont les intérêts seraient en question, qu'elle ne se ferait de bien à elle-même . . . De la même manière il doit regarder comme un délit négatif, chaque résolution par laquelle une nation refuserait de rendre des services positifs à une nation étrangère, lorsqu'en accordant les services demandés, elle ferait plus de bien à cette nation étrangère qu'elle ne se ferait de mal à elle-même.'

Le préambule du code international est daté du 11 juin 1827. Le même jour, Bentham, toujours soucieux de coucher sur le papier ses pensées, qu'il confinait ensuite dans ses 'repositories,' souvent pour ne plus les retoucher ou même pour ne plus les revoir, rédige quelques autres réflexions dont nous retrouvons copie dans les notes confiées à Jabez Henry. Cette nouvelle série est reproduite sur des feuillets divisés en quatre colonnes. Les idées ne se suivent pas fort méthodiquement, mais elles méritent cependant que nous les passions en revue.

Bentham suggère l'idée de la rédaction d'un corps de droit international par un congrès qui serait composé d'un délégué par Etat civilisé, ce qui, dit-il, revient à dire d'un délégué par Etat chrétien. Ce n'est pas cependant qu'il se fasse illusion ni qu'il voie dans le corps de droit international une panacée universelle. Il est une chose que, de son aveu, pareil corps de droit n'effectuera jamais, c'est d'empêcher un souverain qui a des buts de conquête, de poursuivre l'exécution de ses desseins, mais la réalisation du projet aurait du moins pour effet de réduire au minimum, de *minimiser* pour imiter son néologisme expressif, les occasions de ressentiment.

Dans cette première idée s'enchevêtrent l'idée de conférer des fonctions judiciaires au congrès des délégués des nations et cette autre idée de transformer les ministres plénipotentiaires auprès de chaque Etat en commission du congrès. L'auteur incline même à aller plus loin et à former le premier degré de juridiction pour les affaires internationales d'un juge unique élu par le congrès et investi des fonctions élémentaires du pouvoir judiciaire, à l'exception du pouvoir de commandement. Bentham n'admet pas, du reste, qu'en droit international, un pouvoir quelconque, fût-ce le congrès, exerce l'autorité *impérative*: 'Under a system of international law the imperative could not be exercised by any authority: not even by the international congress. The admission of the faculty of issuing imperative decrees with power for giving execution and effect to them, would have the effect of an attempt to establish an Universal Republic, inconsistent with the Sovereignty of the several Sovereigns within their respective dominions.' Seulement, il soutient qu'il est une foule de questions que,

de nos jours, les Etats ont à honneur de trancher personnellement, alors qu'envisagées en elles-mêmes elles sont indifférentes, et c'est précisement sur ces questions que la décision du pouvoir judiciaire international prévaudrait probablement dans l'avenir si elle s'appuyait sur une argumentation sérieuse et rendue publique. 'On all such matters the decision of a judicatory, if grounded on argumentation universally notorious, would possess a probability of experiencing general if not universal deference.'

Bentham soulève quelques questions accessoires, ainsi celle de la fixité ou de la non-fixité du siège du congrès. 'Seat of the Congress, shall it be fixed or ambulatory? If ambulatory, should it be changing from year to year, two years, or three years, at the several metropolises, the order to be determined by lot?' Cette idée de recourir au sort amène une déclaration piquante: 'Nota bene, écrit Bentham, lot would be a good instrument in various cases.' Autre suggestion: 'The decision of the Congress judicatory should be pronounced in both ways: viz. (1) by open—or (2) by secret suffrage. Query, which first?'

Le grand penseur n'avait jamais eu une bien grande estime pour le livre classique de Vattel. A diverses reprises il le jugea avec sévérité. 'Vattel's propositions, disait-il un jour, are most old-womanish and tautological. They come to this: Law is nature—nature is law. He builds upon a cloud. When he means anything, it is from a vague perception of the principle of utility, but more frequently no meaning can be found. Many of his dicta amount to this: It is not just to do that which is unjust[1].' Dans les notes dont nous nous occupons, il déclare que le livre de Vattel n'est pas à la hauteur du sujet qu'il traite, mais, à son avis, un ouvrage analogue pourrait avoir une grande utilité. Il appert même d'un projet de lettre de Henry que Bentham a recommandé à celui-ci de faire 'a new edition of Vattel, or rather a new work on a similar principle . . .'

Un peu plus loin Bentham revient à son idée de l'égalité des Etats: 'Fundamental principles to be agreed upon by all the States: (1) Universal equality. No State to pretend to any authority over any other State (*a*) on sea, (*b*) on land in the territory of a barbarous nation not being a member of the Congress. (2) All States to be upon a par in Congress, whatsoever be the form of government.' Il affirme sa foi dans la puissance de l'opinion publique: 'The judicatory in *dernier ressort* would in effect be the Public Opinion Tribunal, composed of all the several individuals belonging to all the several States.'

[1] 'The Works of Jeremy Bentham,' published under the superintendence of his Executor John Bowring, t. x. p. 584.

Il signale également quelques points qui, selon lui, mériteraient d'être tranchés, tels que l'autorité de l'Etat sur les étrangers, l'exécution des jugements étrangers, la question de la prise de possession d'un territoire barbare ; les lignes qu'il consacre à chacun de ces sujets permettent d'admirer sa prodigieuse puissance d'analyse. La question de l'occupation est à l'ordre du jour. Voici en quels termes Bentham résumait, il y a plus d'un demi-siècle, ce qu'il y aurait à faire: 'Quantity and dimensions of territory as to which the right of possession or that of intercourse for trade or otherwise, shall be understood to be created by first visitation, by sea or by land, or subsequent visitation after an interval of universal non-visitation continued during a number of years, which for these purposes will require to be determined.'

Là s'arrêtent les notes manuscrites. Certes elles ont quelque chose de décousu, mais elles nous semblent néanmoins présenter un vif intérêt. Elles montrent l'opinion de Bentham sur plus d'un point du droit international et à ce titre déjà elles ont leur valeur. D'un autre côté, elles portent la marque du génie de leur auteur, et même inachevées, elles attestent la main d'un ouvrier habile entre tous.

ERNEST NYS.

THE CIRCUITEERS.

AN ECLOGUE.

SCENE—*The Banks of Windermere. Sunset.*

ADDISON[1]. SIR GREGORY LEWIN[2].

A. How sweet, fair Windermere, thy waveless coast!
'Tis like a goodly issue well engrossed.

L. How sweet this harmony of earth and sky!
'Tis like a well concerted *Alibi*.

A. Pleas of the Crown are coarse and spoil one's tact,
Barren of fees and savouring of fact.

L. Your pleas are cobwebs, narrower or wider,
That sometimes catch the fly, sometimes the spider.

A. Come let us rest beside this prattling burn,
And sing of our respective trades in turn.

L. Agreed! our song shall pierce the azure vault:
For Meade's[3] case proves, or my Report 's in fault,
That singing can't be reckoned an assault.

A. Who shall begin?

L. That precious right, my friend,
I freely yield, nor care how late I end.

A. Vast is the pleader's rapture, when he sees
The classical endorsement—'Please draw pleas.'

L. Dear are the words—I ne'er can read them frigidly—
'We have no case, but cross-examine rigidly.'

A. Blackhurst[4] is coy, but sometimes has been won
To scratch out 'Hoggins[5]' and write 'Addison.'

L. Me Jackson[6] oft deludes; on me he rolls
Fiendlike his eye, then chucks his brief to Knowles[7].

A. What fears, what hopes through all my frame did shoot
When Frodsham's breeches, Gilbert, felt thy boot[8]!

[1] A special pleader.
[2] A criminal lawyer and reporter of 'Lewin's Crown Cases.'
[3] Meade and Belt's Case, 1 Lewin C. C. 184, per Holroyd J.: 'No words or singing are equivalent to an assault.'
[4] An attorney of Preston.
[5] Hoggins, a barrister on the Northern Circuit—afterwards a Queen's Counsel.
[6] An attorney.
[7] C. J. Knowles, on the Northern Circuit—afterwards a Q.C.
[8] Frodsham, an attorney, was summarily ejected by Gilbert Henderson (Recorder of Liverpool) from his chambers, for some offensive words used by him during an arbitration. Afterwards Frodsham sued Henderson for damages for the assault. His counsel was Serjeant Cross. John Williams, afterwards a Judge of the Court of Queen's Bench, led

L. O! all ye jail-birds, 'twas a day of sulks
When Roger Whitehead flitted to the hulks.

A. Thoughts much too deep for tears subdue the Court
When I *assumpsit* bring, and god-like waive a tort.

L. When witnesses, like swarms of summer flies,
I call to character, and none replies,
Dark Attride[1] gives a grunt, the gentle bailiff sighs.

A. A pleading fashioned of the moon's pale shine
I love, that makes a youngster new-assign.

L. I love to put a farmer in a funk,
Then make the galleries believe he 's drunk.

A. Answer, and you my oracle shall be,
How a sham differs from a real plea?

L. Tell me the difference first, 'tis thought immense,
Betwixt a naked lie and false pretence.
Now let us gifts exchange; a timely gift
Is often found no despicable thrift.

A. Take these, well worthy of the Roxburghe Club,
Eleven counts struck out in Gobble *versus* Grubb.

L. Let this within thy pigeon-holes be packed,
A choice conviction on the Bum-boat Act[2].

A. I give this penknife-case, since giving thrives;
It holds ten knives, ten hafts, ten blades, ten other knives.

L. Take this bank-note (the gift won't be my ruin),
'Twas forged by Dade and Kirkwood; see first Lewin[3].

A. Change we the *Venue*, Knight; your tones bewitch,
But too much pudding chokes, however rich,
Enough 's enough, and surplusage the rest.
The sun no more *gives colour* to the West,
And, one by one, the pleasure boats forsake
Yon land with water covered, called a lake.
'Tis supper time; the inn is somewhat far,
Dense are the dews, though bright the evening star;
And Wightman[4] might drop in and eat our char.

for the defence, and concluded his speech to the jury by saying, 'I vow to God, gentlemen, I should have done the same thing myself—an insult—a kick—and a farthing—all the world over!' The jury accordingly found for the plaintiff with one farthing damages. Cross tied up his papers and remarked, 'My client has got more kicks than halfpence.' But it was always a matter of doubt whether he knew that he was saying a good thing or not. He had never before said anything to provoke such a suspicion.

[1] Sir Gregory Lewin's clerk.

[2] 2 Geo. III. c. 28. 'An Act to prevent the committing of Thefts and Frauds by persons navigating Bum-boats and other boats upon the river Thames,' rep. 2 & 3 Vict. c. 47, s. 24.

[3] 1 Lewin C. C. 145.

[4] Afterwards a Judge of the Court of Queen's Bench.

These lines were written by John Leycester Adolphus, whose name is so well known as a reporter in conjunction first with Barnewall and afterwards for a much longer period with Ellis. He was appointed Judge of the Marylebone County Court in 1852. He was, beyond his law, a man of the finest literary accomplishment and taste, and wrote the 'Letters to Richard Heber, Esq., containing critical remarks on the Series of Novels beginning with Waverley, and an attempt to ascertain their Author.' This charming and ingenious little work was published in 1821, reached a second edition in 1822, and procured for its writer the friendship of Sir Walter Scott.

This eclogue formed part of the amusement provided after dinner in the festive Grand Court holden while the Northern Circuit was at Liverpool for the Summer Assizes in 1839.

The lines have already been printed, but many years ago, in Notes and Queries, 3rd Series, v. 5, p. 6 (2nd January, 1864). No apology can be needed for reproducing in these pages so choice a specimen of legal humour, parts of which may now almost serve as a sort of valedictory address to the defunct science of Special Pleading.

P. Q. R.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Moritz Voigt, Die XII Tafeln. Geschichte und System des Civil- und Criminalrechtes, wie Processes der XII Tafeln nebst deren Fragmenten. Leipzig: Verlag von A. G. Liebeskind. 1883. 2 vols. 8vo. xii, 737 & x, 859 pp.

Sir Henry Maine has undoubtedly the great merit of having given a mighty impulse to the historical consideration and study of law. It is chiefly due to the most attractive sketch he had given of the development of legal institutions in the ancient periods of civilisation that questions of the early forms of conveyance, contract, and the like are frequently discussed in this country at the present time.

Under such circumstances, the work under consideration, which is the fruit of immense labour and which is founded on inquiries of the same author into the most intricate problems in Roman legal history, will meet with some sympathy in this country; the more so, as at least one of the works alluded to, 'Das jus naturale, aequum et bonum und jus gentium der Römer,' is to some extent known to English scholars and was recently called attention to[1]. It is an immense merit of this treatise that it has settled the difficult notion of jus gentium, which is no doubt of the utmost importance for a rational understanding of the historical development of Roman law.

There is no doubt that there existed in the earliest historical times a jus gentium in the sense of a public international law, i.e. a body of rules by which the intercourse of the Italic gentes with one another was determined; thus rules as to the treatment of ambassadors, the declaration of war, the conclusion of peace were recognised amongst these tribes. But Voigt has shown that jus gentium so far as it related to matters of private law had been gradually developed since the beginning of the sixth century after the foundation of the city, in consequence of the growing intercourse, and especially the frequent mercantile exchange, with other nations. To meet the necessities of the various relations of life thus arising, a corresponding body of rules imperceptibly grew up which in their origin are doubtless customary law. This so-called jus gentium formed in the course of time an extensive system of private law, which being recognised amongst all nations connected with the Roman Empire as a jus commune omnium liberorum hominum, or an *international* private law, stood in a remarkable opposition to the jus civile, as the jus proprium civium Romanorum or the law peculiar to the Roman *nationality*.

[1] See Professor Nettleship's Notes on Jus gentium in the Journal of Philology, vol. xiii. p. 169 sqq.

It is obvious that the notion of jus gentium in this sense is distinct from 'the sum of the common ingredients' of different laws which, probably being the elements and principles underlying the particular rules, would hardly form a system of *definite* rules: and it is also distinguished from a 'collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes[1].' It seems to be impossible to assume that there are within the systems of law of different nations or tribes rules which are common to all of them and would form a uniform and complete system of law together, and if so, it would be impossible for any man or body of men to ascertain these rules.

On the other hand, Voigt's notion of jus gentium is also not in accordance with the view that jus gentium is 'in its origin a jus naturae, a philosophical ideal[2].' It is true there are several passages which support such a conception, declaring the jus gentium to be a kind of primordial law which, being implanted by nature itself, is everywhere in the same way in force[3]. But these passages are easily explained by the assumption that the philosophers and jurists of the later times tried to account for the existence of the jus gentium. As they, on one side, were wholly ignorant of its origin and development, and on the other observed that this law was actually recognised by all nations known to them, and further that it was evidently more liberal and showed more consideration to the intention of the parties than the strict and formal civil law, they naturally explained it in the way mentioned and identified it with the jus naturae. The real nature of the jus gentium as a positive law, however, could not escape their attention, and being aware of this fact, they sometimes place it in strong opposition to the jus naturae, as, for example, in I. i. 2. § 2, I. i. 3. § 2, and I. i. 5 pr. The first passage is especially remarkable, in so far as it declares—in opposition to § 1 of the same title—the jus gentium to be the result of common intercourse and human necessities: 'nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt.'

Extremely interesting as it would be to expand these views, it is necessary now to turn our attention to the work of Professor Voigt which we propose to consider. The leading view followed by the author in expounding the law of the Twelve Tables is, that the present state of science in general, and of archæology in particular, requires more than a simple account of the materials contained in the sources themselves. He thinks that we require an exposition of the whole system of early law, showing the connexion of the several portions with each other. And having an unrivalled command of all the sources which in any way bear upon the topic he is dealing with, the author is able to give an account of the early civil and criminal law and the law of procedure, fuller and more extensive than we should have expected even from a scholar so well acquainted with the legal history of Rome.

[1] See Sir Henry Maine, Ancient Law, pp. 49, 50.
[2] Professor E. C. Clark, Practical Jurisprudence, p. 358.
[3] Cf. e.g. Gaius, i. 1, Inst. i. 2. §§ 1, 11.

The first volume is intended to lay the foundation for the second, and is divided into a *Historical part* and a *general Juristic part*.

In the historical part the origin, motives, and tendencies of the decemviral legislation are set forth, together with its relations to the Hellenic laws. Then the social and economical conditions as well as the nature of the character of the Roman people in the beginning of the fourth century A. U. C. are discussed as forming the natural foundation for the legislative work of the period. Lastly, the author deals with the Code itself, considering the nature of the law of the Twelve Tables and their provisions, the arrangement of the several enactments and their traditional history, the commentaries written upon the Twelve Tables, and the attempts which have been made to reconstruct their original text.

The general part begins, in its first chapter, with a consideration of the nature and inter-relation of the different rules which governed the conduct of men in those ancient days, i. e. fas, jus, and boni mores.

Chapter II discusses the very important notion of actio which is with Voigt a solemn legal act (including both juristic act and legal remedy), which as a rule required—1. certain solemn words, verba; 2. certain movements of the body as symbolic explanation of the intention of the person acting, actus; 3. presence of certain persons as witnesses to the act, testatio.

Chapters III and IV are devoted to the notion of Persons, the capacity for rights and duties and such conditions of men as are legally important, as infantia, impubertas, &c.

The following Chapters (V, VI, VII) deal with the notion of legal rights and duties, with the acquisition and loss of rights as well as their violation.

The consideration of the violation of rights naturally leads to that of the remedies provided against it, and so to the discussion of the principles of self-help and procedure (Ch. VIII and IX), which are followed by an explanation of the Civil procedure in Chapter X and the Criminal procedure in Chapter XI.

The Appendix (pp. 691–737) contains the fragments of the Twelve Tables in a new arrangement, conveniently combined with perpetual references to other testimonies in our sources as well as those passages in Voigt's book by which the matter in question is explained.

The second volume contains the system of the Civil, i.e. private law (pp. 1–777) and Criminal law (pp. 779–845) of the Twelve Tables.

The exposition of the Civil law is subdivided into three parts, dealing with jura in rem (dingliche Rechte), obligatory rights (Forderungsrechte), and rights over other persons (which are not jura in rem).

1. According to Voigt, the notion of the 'dingliche Recht' (Ch. I) is in reference to those early times to be taken in a very wide sense, comprehending every right protected by a vindicatio, and accordingly having for its object not only the *manus*, i.e. the power over the members and the property of the family, but also the *libertas* itself, the *hereditas*, and the *tutela* (Chapters II–V).

2. The second subdivision deals in the first chapter with Obliga-

tions in general, discussing their nature and requisites, their origin, extinction, and effects, whilst Chapter II explains the single obligations under the usual headings of contract, quasi-contract, delict and quasi-delict.

3. The personal rights over other persons are treated in four chapters, explaining the relation of patron and clients, of husband and wife (as far as manus is not concerned), the cura prodigi and furiosi, and the relations between a corporation and its members.

Any attempt to give an idea of the comprehensive character of this work would require far more space than can be devoted to the purpose in this review. We may however be permitted to show in a single instance how greatly our knowledge of the ancient institutions of Rome may be advanced by the researches of Professor Voigt, and for this object we propose to give a short sketch of the system of contracts of the Twelve Tables as stated by him.

It has been repeatedly pointed out that there was comparatively little room for contract in the early law. This naturally results from the condition of a people whose chief occupation is agriculture, and whose necessities are provided for by the labour of single families, the members of which work for the family benefit. Under such circumstances, it is mainly the exchange of the necessaries of life which now and then becomes unavoidable. Although such transactions were sometimes necessary, it is yet a peculiar characteristic of ancient law that no legal force was attached to the agreement itself (for instance the agreement to exchange), but to the transaction which followed the agreement and was intended to carry it into effect; accordingly in the Twelve Tables, not the agreement to sell a certain thing, but the subsequent transfer of it for the price agreed on—mancipatio—had legal effect.

Nevertheless, we must not suppose that obligations and contracts were altogether unknown to the law. The only peculiarity was that contracts had for the most part no independent form of their own. It is well known that in the case of mancipatio the parties could make additional declarations which formed part of the so-called nuncupatio, which in itself was a portion of the act of transfer, i.e. the mancipatio. Thus, by a so-called *lex mancipii* the *mancipio dans* could warrant a certain quantity or quality of the thing transferred, and the mancipio accipiens could similarly promise to do something with the thing received by him, for instance, to manumit the slave mancipated. It follows that by the lex mancipii similar objects could be secured, as in later times by the *pacta adjecta*, which also formed a portion of another transaction (contractus bonae fidei) and derived from it their binding force.

Of greater importance seems to have been the contractus fiduciae. By mancipatio sub fiducia (viz. remancipationis) only temporary ownership was granted in a thing, and thus different objects could be attained which only several hundred years later could take legal effect as contractus. It was only necessary to formulate the fiducia according to the object intended by the parties, i.e. to promise to re-transfer ownership either when the time came at

which the transferor should claim it back (depositum), or if the use agreed on had been made of it by the transferee (commodatum), or as soon as the money lent had been paid back (pignus). Even a loan of money could be made in the form of mancipatio, for in the case of the mancipatio cum creditore the sum of money given by the mancipio accipiens, i. e. the creditor, was in point of form the pretium mancipationis, paid for the thing mancipated (i.e. in reality the pledge). It is obvious that other agreements also could be made actionable in this way, provided a temporary transfer of a thing was contemplated by the parties, e.g. a mandatum: if for instance a person going abroad intended to leave his property with a friend to be administered by him gratuitously, such intention could be made legally effective by mancipatio sub fiducia.

Thus in the form of the ancient conveyance the different objects aimed at by the contractus re, and, to some extent, also those of consensual contracts, could take legal effect[1]. There were however in the Twelve Tables several contracts recognised which have a form of their own. One of these was the nexum, which was a loan for consumption of money (aes) or other ponderable things. Professor Voigt has in our opinion convincingly shown that the term 'nexum' in its original sense is by no means identical with every transaction per aes et libram[2], and that it was not till the later times of the republic that the term nexum was used as synonymous with 'omne quod geritur per aes et libram.' In the ancient law it was common to the transfer by mancipation and to the contract of nexum (or nexi datio) and its dissolution by the so-called nexi solutio, that they were formally to be executed 'per libram' (in the earlier times the use of metal as money was unknown, and on that account the form 'per aes et libram' is not the most ancient one).

A second contract with a special form of its own is—according to Voigt—the dotis dictio. It consisted in a solemn declaration (dotem tibi dico) by which something was promised as a dower to the (present or future) husband either by the wife or bride, or if she was under paternal power by her father; a promise which however did not require a formal acceptance on the part of the person addressed.

In addition to this there was already in the law of the Twelve Tables a kind of contract, the so-called vadimonium, which had the functions of suretyship in the later law. It was peculiar to this institution that the vas promised something which another person was bound to do, and in case the latter should not comply with his duty, the vas promised to pay a penalty. Thus vadimonium

[1] Sir H. Maine in his Ancient Law does not seem to be aware of this possibility (chapter ix, especially p. 332).

[2] This is commonly assumed; cf. e. g. Sir H. Maine, Ancient Law, p. 315. [In justice to Sir H. Maine, it must be remembered that 'Ancient Law' was published nearly twenty-five years ago, and that readers of later editions are expressly warned by the author that they do not profess to be substantially more than reprints. The derivation of the Stipulation from the Nexum is now considered untenable by the best authorities; but if it is still taught to students as an unquestioned fact on Sir H. Maine's authority, that is the fault not of Sir H. Maine but of the teachers.—Ed.]

differed from fidejussio, for the vas did not become privy to an existing obligation, but contracted an obligation of his own.

One objection may be made to Professor Voigt's method. He has undoubtedly an extraordinary power of juristic construction, and his full command of the authorities relating to his subject sometimes tempts him to carry his construction farther than the positive evidence seems to warrant. But his work has the great merit of putting before the eyes of the reader definite results which form by their connection with each other one uniform system. It must further be admitted that his assumptions are always plausible, and such as would suggest themselves to one well acquainted with the economical and social conditions of the time.

Under these circumstances, we look forward with much interest to another publication promised by the same author; namely a history of the Roman law. We may fairly expect that we shall in this work be presented with a clear, uniform and comprehensive survey of the gradual development of the Roman law.

ERWIN GRUEBER.

Essays on some disputed Questions in Modern International Law. By J. T. LAWRENCE, M.A., LL.M. Cambridge: Deighton, Bell & Co. 8vo. 259 pp.

THE lectures collected and in some cases amplified for publication by Mr. Lawrence, the deputy Whewell Professor of International Law, contain much useful information and the expression of interesting opinions on some special questions of practical importance, particularly those which are connected with the Suez Canal and with the interpretation of the Clayton-Bulwer treaty. But Mr. Lawrence's book will be here considered, and the author himself would perhaps wish it to be considered, as presenting a theoretical or general view of the life which the nations of Europe live side by side, and of the laws to which such international life is subject. Writers on international law continue to express different opinions as to the theoretical nature of the topics which it is their object to discuss without forfeiting either scientific accuracy and symmetry or practical utility. We may conclude that the true theoretical view is not yet established beyond reasonable doubt: and there is no better method of discovering it than that employed by Mr. Lawrence. He does not, like some writers, indulge in *a priori* speculations as to the nature of things in general, and then dogmatically assert the part which nations must play in the universe, without so much as inquiring what nations the universe contains nor how they are given to behave: but he looks at the actual nations which exist, recalls their past, criticises their present, and tries to conjecture their future behaviour; and then, eliminating what is accidental and explaining what is apparently inconsistent, arrives at the essential characteristics of international relations, and disentangles the theory by which any particular group of diplomatic or bellicose incidents may be properly comprehended and classified.

A book which consists of a collection of lectures given on separate occasions cannot well constitute a complete and systematic exposition of a theory; but any reader of these essays will be able to follow the thread of theoretical reasoning easily enough, especially as there are some sign-posts set up in the Preface in order to help him to do so.

Let us turn our eyes then with Mr. Lawrence towards the group of civilised nations living on their adjacent territories or facing one another from the opposite sides of seas or straits, busy each with its own political developments and administrative oganisation, or with schemes of colonial enterprise; entering at the same time into commercial relations with one another, in which some strive to increase their own prosperity at the expense of that of other nations, while some think they will gain most by aiming at the greatest prosperity of the greatest number of nations; entering into alliances one with another, compromising difficult questions, referring disputes to arbitration; and every now and then striking fierce blows at one another with all the resources of civilisation which they can command, each nation killing the members of its neighbour and sacrificing many of its own, destroying valuable property, and incurring or causing its opponent to incur great expenses which must be met by increased taxation and a consequent diminution in the comfort and well-being of taxpayers. The first question which Mr. Lawrence asks with a view to the establishment of a theory is whether these nations are subject to law. Some writers have said that they are not: and Mr. Lawrence seems to think that the speculations of such writers 'are directed to lessen the estimation in which' the body of learning invariably spoken of as international law 'is held.' It is perhaps to be regretted that Mr. Lawrence attributes this dangerous design to those who differ from him. By doing so he imports something like prejudice into the discussion: and the last paragraph of his first lecture, in which he claims 'to have rehabilitated International Law' and to have 'pointed out its right to the title of law,' makes us doubt for a moment whether Mr. Lawrence has not been tempted to look on International Law as a client to be defended from libellous aspersions, and so been led away from that impartial frame of mind which becomes the scientific investigator. However, we may suppose that Mr. Lawrence's conclusions would have been the same even if he had not suspected his opponents of any personal ill-will towards an important branch of human learning: and this conclusion is that the conduct of nations towards one another is subject to principles which are properly described as laws. The element of force is not, according to Mr. Lawrence, a necessary element in a law. It is in fact an important element in the laws which have governed individuals at certain stages of human development: but a law may exist and govern the conduct of individuals though there be no force to support it, no sovereign body to wield such force, and no sanction to be inflicted on the law-breaker or utilised as a threat against the ill-disposed. The ideas we must readily associate

with the word law are only incidentally connected with the thing. If there was a nation without a legislature, a statute book, a judicial Bench, or a High Court of Justice, without a single police magistrate or a single prison; a nation without a Central Office, a County Court Judge, or a Chief Clerk, such a nation might yet consist of individuals subject to law. For there might have been among the individuals composing the nation so much discussion on legal questions, leading to such a clear-sighted apprehension of the great principles relating to human conduct, such a disposition to conform to those principles, and such candour and ingenuity in discerning their application to particular difficulties, that legal machinery would be superfluous. The Community of Nations has not indeed quite reached this ideal condition; but if nations are not absolutely certain to perceive the applications of International Law, nor yet to bow to its dictates when they appear to conflict with their interests and ambitions, it must be remembered, on the other hand, that they are not quite devoid of the ordinary legal machinery. Adding together the international legal machinery which actually exists, and the readiness of the nations now flourishing to apprehend and to follow certain principles affecting their relations with one another, Mr. Lawrence finds enough to justify the opinion that nations are subject to law.

The statement that nations are subject to law is of course not to be supposed to mean that the law is never broken or even that it is always formulated. Principles applicable to international relations exist; and nations are so happily constituted that they can formulate and follow these principles for themselves without the aid of sovereign bodies, effective sanctions, and the other incidental characteristics of the laws applying to individuals, to which Austin, unnecessarily according to Mr. Lawrence, attaches such great importance. Before the law governing nations is completely established, there must be a good deal of civilisation; at intermediate stages there will be incomplete law gradually developing; and at the dawn of civilisation there is no law at all, but only principles and an undeveloped capacity for their perception and for adherence to them. Mr. Lawrence deals with the period of international lawlessness and with the gradual transition therefrom to the earlier stages of law in his essay on Grotius. The nations of Europe had not advanced very far towards the recognition and acceptance of international law before the time of Grotius. Such law as they had depended on the superiority exercised by Popes and Emperors over the European States; and with the disappearance of such superiority international lawlessness became imminent. Grotius staved off this danger, and gave international principles a much better chance than they had yet had of becoming laws by the publication of his work, De Jure Belli ac Pacis. He was wrong in his view of the law of nature, and wrong in his conception of the applicability of pure Roman law to international relations. These errors are pointed out by Mr. Lawrence; but he maintains that Grotius did a great work by giving a systematic and intelligible account of the principles really governing international life. The theory of

Grotius, which was generally accepted with some variations, answered far better than the theory of the Empire or of the Papacy. Statesmen acknowledged and partly conformed to the great eternal principles, and international lawlessness was definitely and unmistakeably replaced by international law, which has never since Grotius's time been in any danger of disappearance. The improvement in practical warfare between the Thirty Years' War and the War of Spanish Succession is the example of this change most insisted on by Mr. Lawrence. One of Grotius's fundamental theories was the equality of nations; but this theory does not suit with modern facts, and the essay on the 'Primacy of the Great Powers' shows us how the nature of international law is affected by undoubted facts as to the relative importance of the actually existing States.

The last essay in the book deals with 'The Evolution of Peace.' When we have ascertained the true nature of nations, of the laws which govern them, of the different kinds into which they are divided, and of the way in which they have behaved or are likely to behave, we could certainly make no more valuable use of our scientific knowledge than by solving the question whether or not they are likely to go on fighting with one another. Mr. Lawrence solves this question in the negative. He shows that the complete disappearance of war would be a change like some of the changes which have taken place in past times, or another step in a process of evolution which has already made great advances. The point is an important one to Mr. Lawrence's general theory, because the disposition of nations to give up war is a part of that almost superhuman virtue which enables nations to enjoy law without the petty incidental devices whose importance is so unduly emphasised by Austin. It is therefore perhaps worth while to refer very shortly to some of the facts which Mr. Lawrence's faith in Evolution enables him to regard as consistent with his theory.

An estimate made in 1860[1] of the wars of Great Britain and of the Continental States of Europe between the end of the Great War and the year 1860 gives some results not exactly illustrative of the Evolution of Peace. There was not one year from 1815 to 1860 during which England was not either actually at war or engaged in some dispute likely to end in war. There are many years during that period when England was carrying on two wars in different parts of the world. She was at war (either as a belligerent in the strict sense, or as engaged in hostile operations only technically distinguishable from war) with Turkey in 1828, with Holland in 1832, with Russia from 1854 to 1856, and for several years with China. Desperate wars with the Burmese, the Afghans, the Sikhs, and the Caffres occupied her arms almost continuously through many 'peaceful' years[2]. Meanwhile

[1] See a Table given at pp. 63–72 of 'Essays in Political and Moral Philosophy' by T. E. Cliffe Leslie. 1879.

[2] [It might fairly be replied that such wars, however desperate, have a somewhat remote bearing on the question whether the relations between civilized Occidental

there was not a year without a long list of hostilities and warfare on the Continent. Since 1860 there have been great wars in almost every part of the Continent of Europe, and a great war on the other side of the Atlantic. The nature of these wars leads most people to consider that the last twenty years have witnessed a revival of war. In fact it is only because of the terrible character of the wars which have accompanied the consolidation of the German and accelerated the decay of the Ottoman Empire that we are accustomed to think of the preceding era as one of peace. No wars in history tend more than recent wars to support the theory that war is not merely the outcome of international disputes or the sanction of international morality, but rather the natural accompaniment of national progress and development. If our own country has kept clear of European wars since the time of the Crimea, it has nevertheless, in the opinion of good judges, been very near to taking part in them on more than one occasion, and the 'little wars' of England have certainly not diminished in number or importance within the last twenty years; and at this very moment warlike preparations are being made and large reinforcements despatched to a stubborn and arduous contest amidst unmistakeable manifestations of popular sentiments which, to say the least, do not constitute a guarantee of the successful Evolution of Peace.

J. K. STEPHEN.

A Digest of the Reported Decisions of the Courts of Common Law, Bankruptcy, Probate, Admiralty, and Divorce. Founded on Fisher's Digest. By JOHN MEWS, assisted by C. M. CHAPMAN, HARRY H. W. SPARHAM, and A. TODD. In Seven Volumes. H. Sweet; Stevens & Sons; Maxwell & Son.

ALL practising lawyers must have already very often used this Digest since it was published, and have made up their minds respecting its merits; and any reference to them now comes very late. Like so much other good work in law and elsewhere, this Digest has been built up slowly and by many hands. It is based on Fisher's Digest, which was based on Harrison's. The latter was preceded by a long line of works of the same kind—for example, by Viner's Abridgment in 1746, and Chief Baron Comyns' in 1762. Harrison's was in some respects—not in all, for Comyns' work, so great a favourite with the late Mr. Justice Willes, had excellent points of its own—an improvement upon anything which preceded it. Fisher's, published in 1870, marked a distinct advance; and Mr. Mews and those who have assisted him have introduced several improvements. I have used the new edition almost daily;

powers tend on the whole to become more peaceful. So as to insurrections. But we so far agree with the writer of the article as to hold that the peace of nations comes by the strong man armed, and not by amiable talk about universal arbitration.—ED.]

and it seems to me that it is in many ways far better than its predecessor—more nearly complete, more accurate, and more skilfully arranged. The few inaccuracies which I have noted are unimportant; they are chiefly either misprints of figures, or they arise from the editors' trusting a little too implicitly to head-notes. It is a truism to say that no practising lawyer can well dispense with these volumes; and lawyers in other countries may well envy the possession of such admirable tools[1]. What a pathless jungle the Common Law would be but for the fact that it is here faithfully mapped out!

Not that the book is perfect. Some years hence Mr. Mews will no doubt give a still better edition. Since the so-called 'fusion' of Law and Equity, the reason for the existence of separate Digests of Common Law and Equity is gone. Yet these volumes contain only a 'selection' of the cases decided in the Court of Chancery, and exclude the entire subject of administration actions. This produces, I have found, inconvenience. Suppose, for instance, that a point in Bankruptcy Law is under investigation. Reports of cases on Appeal may be found in some of the sets of Chancery reports, which may not be within the purview of this Digest. Why not fuse the two Digests, even if it be necessary to exclude many old cases cited in these volumes? The editors have not gone further back than 1756, the year when Lord Mansfield became Lord Chief Justice of the King's Bench. This, of course, excludes a few reports—the Reports, the Modern Reports, and Croke's, for instance—which are still occasionally cited. But, except to the antiquarian or student of legal history, reports of an earlier date than 1756 possess little interest. Nothing in the recent history of law is more remarkable than the disrepute into which, in the eyes of most members of the Bench, old Common Law decisions have fallen. It is very often worse than useless to cite them. A judge has been known to dismiss contemptuously as 'a bundle of old umbrellas' fine old rating cases from Manning and Granger and Meeson and Welsby, abounding in nice distinctions; and a decision of 1876 has been half seriously referred to from the Bench as 'ancient law.' Arguments such as the late Mr. Justice Willes, when at the Bar, elaborated—skilfully constructed mosaics of all the existing authorities, curiously dovetailing all relevant cases so that the Year Books were harmonised with Meeson and Welsby—have become rare, if not well nigh impossible. In regard to old authorities there does not exist the curiosity or, I may add, the respect which made it once possible for Courts to believe that they could not but be profitably spending the public time in laboriously examining all the cases. Only in fiction is the modern English Judge the slave of precedent; the lawyer who has to 'advise,' or who writes 'opinions,' finds that he is very much the reverse. I would venture to suggest one or two other points to which

[1] These volumes are, it seems to me, incomparably better planned than Abbott's *National Digest of American Decisions*, Shaw's *Digest of Cases Decided in the Supreme Courts of Scotland*, or Dalloz's *Jurisprudence Générale*.

future editors may do well to give their attention. Some one projected 'a harmony of the reports' on the plan of a class of works well known in theology. Everyone is aware that in the older reports cases are scattered about in an embarrassing manner. To mention one striking example known to every reader of Smith's Leading Cases, the *disjecta membra* of *Manby* v. *Scott* are found in a dozen places, the head here, a limb there; the argument of Sir Orlando Bridgman in Bridgman's Judgments; the decision of Hyde J. in Modern Reports; that of Hale C.B. in Bacon's Abridgment. Probably it would not be worth while to note in the Digest slight differences between the various versions of the same decision. But where the differences are serious—where, as often happens, one report is at issue with another in regard to the only point for which the case is an authority—it would be well to insert in the Digest a caveat. It would, too, be an advantage, fully compensating for the great labour necessary, to append to the cases their dates. Authorities which sound meaningless can often be made to speak good sense when their exact position in time is known.

The editors have very properly, it seems to me, omitted the summaries of Statutes which appeared in Fisher's Digest. They were of little use. Nothing short of the exact words of a Statute satisfies a lawyer; and Chitty's Statutes, as edited by Mr. Lely, answer fully all usual requirements. Another excusable omission is the exclusion of lists of over-ruled and 'impeached' cases. To prepare such a catalogue as would be of any real value would involve labour and responsibility from which the editors might be pardoned for shrinking.

JOHN MACDONELL.

The Law and Practice of the Courts of the United Kingdom relating to Foreign Judgments and Parties out of the Jurisdiction, to which are added chapters on the Laws of the British Colonies, European and Asiatic Nations, and the States and Republics of America. By FRANCIS T. PIGGOTT. Second Edition, revised and enlarged. London: Wm. Clowes & Sons, Limited, 1884. Large 8vo., xlvi and 626 pp.

MR. PIGGOTT tells us that 'a first edition can scarcely pretend to be more than a sketch of any subject; in the second the author may hope to arrive at more perfect and finished work.'

The truth of this principle is open to question, and Mr. Piggott's own performance confutes his doctrine. His early book on Judgments was a better book than this his second edition, and this for the very sufficient reason that it was considerably shorter. But even Mr. Piggott's original book was a work of no great merit, and now that it shows a tendency to increase in size, and we must therefore suppose in circulation, the time has come for explaining in as few and simple words as may be the reasons for holding that

Mr. Piggott is one of those writers who confuse size with greatness and produce books which discredit the very name of a jurist.

Mr. Piggott is a theorist and jurist or he is nothing. His work attempts to deal in a philosophical manner with some of the most difficult portions of that admittedly thorny topic—the (so-called) conflict of laws, and the primary question to be considered is whether our author shows any capacity for legal speculation.

There is no fairer way of testing Mr. Piggott's workmanship than to examine his fundamental doctrine in reference to foreign judgments. He tells us with more or less truth that two theories have been propounded as to the grounds on which English Courts enforce foreign judgments. The one he terms 'the doctrine of comity,' the other the 'doctrine of obligation.' The first of these doctrines is in substance that English tribunals are bound by the comity of nations to enforce the decisions of foreign Courts; the second of these doctrines is that the judgments of foreign Courts are enforced in England because there is a legal duty or obligation on the foreign debtor to obey them. Mr. Piggott is dissatisfied with each of these doctrines, and propounds the great dogma that foreign judgments are enforced in England out of combined considerations of comity and of obligation. His grand proposition is thus stated:—

'*There is a legal obligation* existing against the debtor in the State where the judgment has been pronounced; the obligation has been disobeyed. By reason of the debtor's absence from the jurisdiction of its Courts, and there being no property on which execution can issue, the State is unable to enforce the sanction.

'*By virtue of the Comity of Nations*, a foreign State, to which the debtor has gone, will clothe the obligation deprived of its correlative sanction, with another sanction auxiliary to it: and by so doing will endue it with the power resembling that which it has lost.

'This I have called the doctrine of OBLIGATION AND COMITY.'

We have stated the doctrine of obligation and comity in Mr. Piggott's own words lest we should be accused of misrepresenting his theory. It is on the face of it open to three objections. The first objection is, that the dogma, whether true or false, whether full of import or meaningless, has no special reference to judgments, but applies (if at all) to all cases in which English Courts recognise rights acquired under foreign law. The motive for such recognition may be comity, justice, expediency, convenience, moral obligation, or anything you like. But whatever be the motive for recognising a right acquired by *A* against *X* in France under a contract made and to be performed in Paris, that motive and no other is the motive for recognising a right acquired by *A* against *X* under the judgment of a French Court, e.g. that *A* is entitled to recover his debt from *X*. The second objection is that the investigation into the motives which lead an English or any other tribunal to recognise and enforce rights duly acquired under the laws of a foreign country leads us hardly a step towards solving the problems connected with the conflict of laws. English Courts in many cases do and in some few cases do not treat as valid rights acquired under contracts

made in foreign countries. This fact is in no way explained by saying that the Courts recognise contracts on principles of good-will or because a promisor is under an obligation to perform his promise. The third reason is that Mr. Piggott's futile doctrine, which explains nothing, diverts attention from the true problem which needs solution. It is admitted that English Courts give effect (in general) to judgments pronounced by foreign tribunals of competent jurisdiction, i. e. by Courts which, according to the view of English Judges, have a right to pronounce a decision on a given matter. The problem (and it is by no means an easy one) which needs a solution is what are the principles on which English Judges decide whether a foreign court has or has not the right to pronounce judgment on a given matter. On this topic Mr. Piggott's dogma throws no light whatever. That he occasionally comes near the true question to be debated is probable. It is hardly possible that his huge treatise should do nothing whatever towards elucidating the one really perplexing point in the law as to foreign judgments. But Mr. Piggott with all his pretensions has not, as far as we see, either met or solved the true difficulty of his subject. The principles which lie at the bottom of the treatment due to foreign judgments and of the more general topic of which foreign judgments form a part, namely the theory of jurisdiction, will be solved only by a thinker who bears carefully in mind two indisputable facts: first, that what English Courts recognise is not in strictness a foreign judgment, but rights acquired under foreign judgments; and secondly, that the rules of so-called private international law are based on the recognition of actually acquired rights, i. e. of rights which when acquired could be really enforced by the sovereign of the State where they have their origin.

A. V. D.

A Draft Code for Victoria. (A Bill to declare, consolidate and amend the Substantive General Law. Brought in by the Hon. W. E. Hearn.) Melbourne, November 1884. 250 pp.

This is the first part of a serious attempt to codify the common law, notable for an entirely new scheme of arrangement. Of this scheme we are unable to approve, for the short reason that it breaks up familiar heads of the law, and confounds familiar divisions, without any cause which we can perceive to be adequate. So far as it is before us, the proposed Code purports to deal with the Duties of the People. The Rights of the People are to follow. Now this primary division appears to us a fallacious one. All rights imply corresponding duties; most duties imply corresponding rights. According to the dichotomy of this Draft Code, the Duties of the People are mainly to abstain from public offences and private wrong-doing. The law of Property and Contract seems to stand over for the title of Rights. We had thought it was no less a man's duty to perform his contracts than to forbear from trespasses; and

that, on the other hand, the right to be free from trespasses was in one sense more absolute than the right to have a contract performed, for one cannot be a citizen at all without having the former, while the latter does not exist until a valid contract has been made. Then the heresy of mixing up Public with Private Law is adopted and worked out in the most systematic fashion. It is well meant, and there is much honest work in it; but we hope the legislature of Victoria will think more than once or twice before enacting this elaborately revolutionary substitute for the Common Law.

Perhaps the best part is the preliminary chapter of Interpretation. But from this commendation we must except a series of 'Maxims of the Law,' whereof some appear to us doubtful or more than doubtful, others superfluous, and others too widely expressed. 'Neither Her Majesty nor any person shall have any other power than that which the law allows to her or to him:' either a truism or a sadly meagre Bill of Rights. 'No person shall change his purpose in such a manner and in such circumstances as to interfere with the legal right of any other person.' If I once interfere with your legal right, what does my purpose or the change of it matter? The marginal note guides us to some fantastic variations on the doctrine of 'part performance' by Malins V.C. (founded on an earlier decision of Sir John Stuart's now expressly overruled by the House of Lords), which had better have remained unreported[1]. 'In the assertion of their rights parties shall use reasonable diligence'—shall they so? What offence then is committed if they do not? A general duty of asserting one's rights is a 'fond thing.'

Detailed criticism on the execution of an undertaking of this scale will hardly be expected, especially when we cannot accept its outlines. But we think we have noticed in divers places the same fault that appears in parts of the Indian Codes, the too ready acceptance of the current version of this or that rule, when the rule itself is already outgrowing that version and seeking a new and better expression. And we regret that Mr. Hearn has adopted the unhappy Austinian triad of 'negligence, heedlessness, or rashness.' Austin's treatment of Negligence is the very worst part of his work.

The Law of Contracts. By J. W. Smith. Eighth Edition, by Vincent T. Thompson. London: Stevens & Sons, 1884. 8vo. 625 pp.

'In bringing this edition of Smith's lectures on the law of contracts up to the existing state of the law,' writes Mr. Thompson, 'the present editor has endeavoured to make his own additions as short as possible, confining them to cases of real importance and to such alterations as were rendered necessary by recent legislation. The editor trusts that the present edition will be found no less acceptable than its predecessors.'

[1] *Coles* v. *Pilkington*, 19 Eq. 174, 178, relying on *Loffus* v. *Maw*, 3 Giff. 592, 603, which is not law: *Maddison* v. *Alderson*, 8 App. Ca. 467, 473, 483.

Mr. Thompson, we assume, has fully discharged his editorial duties; and we can easily believe that his book will have a good sale. But for all this we assert with confidence that the republication at this time of day of 'Smith's Law of Contracts' is a gross mistake, and betrays a complete misconception on Mr. Thompson's part of the circumstances under which an educational work of authority can be republished and re-edited with real advantage. The error into which he has fallen is so common that it needs exposure.

The assumption which underlies the constant attempts made to bring editions of authoritative works 'up to the existing state of the law' is, in substance, that a book which had real worth say forty or fifty years ago is necessarily of worth now, and only needs a little re-editing to meet the requirements of the present day. A knowledge of 'Smith's Law of Contracts' is sufficient to show the baselessness of this supposition. Of Mr. Smith's lectures every student who was called to the Bar twenty years ago ought to speak with unfeigned respect. The book had special merits, both because it was the composition of J. W. Smith and because it was the result of oral exposition. Mr. Smith was one of the best lawyers of the old school; his views of law were based on the forms and rules of pleading, and his book exhibits all the merits and defects which naturally flow from the habit of regarding legal questions from a pleader's point of view. The happy accident that his explanation of the law took the form of lectures gave to his style a simplicity and clearness not often found in legal treatises. His 'Law of Contracts' was in short a far better manual than any other current when Mr. Smith published his first edition. But it is no discredit to Mr. Smith to say that lectures delivered in 1842 could not be anything like the lectures which a man of Mr. Smith's ability would deliver in 1884. There has been a revolution within the last forty years in the method of legal speculation. Savigny's writings, Austin's lectures, the Indian Codes, works such as Mr. Leake's, have changed our whole way of looking at the nature of a contract. If Mr. J. W. Smith were now alive he would himself be the first to re-write his book from beginning to end; he would perceive that to describe the nature of a contract is a totally different thing from classifying contracts, and that the received classification on which he relies, while it has nothing to do with definition, is as futile as any form of division ever laid before students. To classify agreements as contracts of record, contracts under seal, and contracts neither of record nor under seal, is in the sphere of law almost as silly as it would be in the sphere of physical science for a naturalist to classify animals under the heads of rhinoceroses, lions, and animals which are neither rhinoceroses nor lions. Mr. Smith would again most undoubtedly perceive that his whole treatment of the topic of Consideration was as confused and unintelligible as is possible to a teacher who really knows (as Mr. Smith of course did) the subject of which he is treating. He involves himself and his readers in a maze of pleader's technicalities and fictions, and,

if he perceives himself, certainly never made any student perceive that the broad rule of English law is that no gratuitous promise unless it is under seal is valid, and that the technical rule that 'a past consideration does not support a promise' is an inevitable deduction from the invalidity of gratuitous promises. As for his statement of the supposed exceptions to the doctrine that an executed consideration does not support a promise, we can only say that he has himself fallen a victim to his knowledge of pleading and to his ignorance of the true analysis of a contract. Of his exceptional cases two are not exceptions at all, and the other two can with difficulty be supported by the authorities. Mr. Smith could no more have written his treatise under the present condition of legal knowledge than Hume could have composed his History under the present condition of historical knowledge. To assert this does not involve denying either that J. W. Smith was a great lawyer or that Hume had some of the qualities of a great historian, but it does involve a protest against the noxious attempt to make Mr. Smith's book pass as a fit manual for modern readers. It needs not to be re-edited but to be rewritten, and such rewriting would simply be the publication of a new manual of the law of contracts at a time when such a manual is superfluous. Mere students find all they want in Anson's Law of Contract; lawyers find a mass of sound law combined with perfect clearness of exposition in the pages of Mr. Leake. If Mr. Thompson wishes to be of use to the present generation of students he can serve them in two ways. He can cease to bring out new editions of 'Smith's Law of Contracts,' and he may obtain Mr. Leake's permission to publish an abridgment of Mr. Leake's Elementary Digest.

A. V. D.

The Law of Collisions at Sea. By Reginald G. Marsden. Second Edition. London: Stevens & Sons. 1885. 8vo. (about) 500 pp.

We are enabled by the courtesy of the author to give the following account of the changes and new matter contained in this forthcoming edition.

'The second edition of the "Law of Collisions" incorporates the numerous decisions of English and American Courts as to the construction and application of the Regulations for Preventing Collisions at Sea, and touching the rights and liabilities arising out of collision, which have been reported during the past five years. The first chapter (of the first edition) is split up, and is now represented by Chapters I, II, III, V, and X. The subjects of these new chapters are, Negligence, Statutory Presumption of Fault, Liability, Division of Loss, and Incidental Rights and Liabilities arising out of collision. Limitation of Liability, formerly treated incidentally in connection with the measure of damages, now forms a chapter (Ch. VI.) by itself.

'The chapter upon the rule as to Division of Loss contains some new matter of historical (and possibly forensic) interest.

Whilst seeking in the records of the Admiralty for early authorities as to the application of the *rusticorum judicium* the writer found that in *The Resolution*, decided by Sir James Marriott in the year 1789, the rule was applied in a case of "neither ship in fault." From this decision there was no appeal. Further investigation showed that *The Resolution* was not an isolated instance of this application of the rule, and that there was authority for the decision in several earlier cases. It is singular that all these cases, dating between the years 1678 and 1789, should have escaped, as they appear to have done, the notice of the practitioners in the Admiralty Court. The absence of reports, and the rarity of collision cases during this period and for some years after, are the only explanation of their disappearance from legal memory. Not the least remarkable part of the story is the doubt and obscurity which existed at the date (1824) of the decision in *Hay* v. *Le Neve* as to the application, and even as to the existence, of the *rusticorum judicium* as a rule of English Admiralty law. The civilians (of whom Dr. Lushington was one) engaged in that case stated, in answer to an enquiry from the House of Lords, that they were aware of no case in which the loss had been divided by the English Admiralty Court. Lord Stowell, however, corrected this by referring to a case (*The Peterefield*, decided in the same year and by the same judge as *The Resolution*) in which the loss had been divided in a case of "both ships in fault." But it does not appear that Lord Stowell was aware of the decision in *The Resolution*, and there is reason to think, from observations made by him in other cases, that he was not aware of it, or of the earlier decisions which it followed. It remains to be decided whether these cases will be followed at the present day. With an unbroken line of decisions for the last fifty years that the rule is confined to the case of "both ships in fault," it probably will be said that *communis error facit legem*. But in America, where a doubt has always existed as to the rule being confined to the case of both ships in fault, and where Admiralty law has suffered less from the incursions of common lawyers, they may be treated with more respect. It may here be noticed that the series of record books of the Admiralty Court and of the Court of the Judges Delegates (the Court of Appeal from the Admiralty from the latter end of the sixteenth century to the erection of the Judicial Committee of the Privy Council in 1833) is very complete from about the year 1680 downwards. Previous to that date the records, and the sentences during the entire period, are in a terrible state of confusion, and in many cases of decay. The labour of deciphering them is considerable.

'The immediate occasion of the publication of a second edition of this book is the issue of a new code of Regulations for preventing collisions at sea. These are in substance the same as the repealed code. There are, however, additions and alterations of importance. Some of these, such as the rule relating to trawlers' lights, are of doubtful value to seamen; one, the rule as to distress signals, Her Majesty has been ill advised to make, for she has no power to do so.

The constant tinkering of rules intended for the use of seafaring, often illiterate, people is a nuisance and a mistake. The changes made are mostly in the wrong direction. They add to the complexity of the code; some of them are of an unpractical and unworkable character; and the draftsmanship of the entire code leaves much to be desired from the point of view both of the lawyer and the seaman.'

A Treatise on the Law of Negligence. By HORACE SMITH. 2nd Edition. London: Stevens and Sons. 1884. 8vo. 312 pp.

THIS work well deserves the success it has attained. It is clear and simple in its arrangement; and the discussions of questions of principle are sensible and useful, and at the same time confined within reasonable limits. Its value has been increased by well-selected references to American decisions, as well as to the views of other text-writers, American and English, on the subject.

The author wisely discards the distinctions borrowed from modern civilians (not from the genuine authorities of Roman law) of 'gross,' 'ordinary,' and 'slight' negligence; these degrees of comparison involve, in fact, a confusion between the popular and the legal meanings of negligence. Since in law negligence has a negative meaning and signifies the non-observance of a legal duty (see per Willes J. in *Grill* v. *Gen. Iron Screw Coll. Co.*, L. R., 1 C. P. 600), the comparison is only applicable to the degrees of care which the law imposes.

Mr. Horace Smith has been the first among practical text-writers to make this the express basis for the arrangement of his subject. He divides the legal relations out of which a duty to take care arises into those in which more than ordinary, those in which ordinary, and those in which less than ordinary care is required. Such a division is not absolutely valid; the amount of care required of e.g. an owner of realty or a wharfinger varies according to the nature of the duty to be performed, and there are many species, such as the care owed to a bare licensee, which refuse to be satisfactorily and finally classed under any one head (see p. 38). The division is nevertheless capable of being satisfactorily made in a very large number of cases, and when it can be made is of clear practical value. Perhaps a broader distinction may be drawn between the cases where a man is answerable only for himself and his servants, and those where (as in *Tarry* v. *Ashton*, 1 Q. B. D. 314) he is answerable also for the acts and defaults of independent contractors.

In one respect we think the author's definition of his subject is unhappy. 'Negligence,' he says, 'is a breach of duty unintentional and proximately producing damage to another *possessing equal rights*.' The expression 'equal rights' has been apparently suggested by the language of Burrough J. in *Deane* v. *Clayton* (7 Taunt. 489, at p. 499); but that was not a case of negligence, but an action for a

nuisance or a wrongful act analogous to nuisance, by the erection of dog-spears *intended* to kill such dogs as should pursue hares on the defendant's premises. And the words of Burrough J. were not used in the sense in which the author has adopted them. Applied to running-down cases, the phrase is intelligible and appropriate; but apply it to such a case as the neglect to cleanse a sewer (*Hammond* v. *Vestry of St. Pancras*, L. R., 9 C. P. 316), and it is apparent that either it is not sufficiently comprehensive or the language must be strained to the point of obscurity.

Indeed it is not quite clear whether in this factor of Mr. Smith's definition two distinct elements are not included; (i) That the defendant's right is not paramount nor inferior; (ii) That the plaintiff is a person having a right of complaint for the injury available against the defendant. It might have been clearer to say that 'Negligence is the unintentional breach of a duty to take care in the performance of a lawful act, proximately producing damage to a person entitled to claim the observance of that duty.'

Chap. 5 contains an accurate statement of the doctrine of contributory negligence, the value of which is increased by the illustrations. Indeed, since 'the operation of causes is a most difficult subject to deal with' (per Willes J. in *Walton* v. *L. B. & S. C. Railway Co.*, 1 Harr. & Ruth. at p. 429), this chapter would be still better if a few more of the leading cases were embodied in the text itself. Such cases as *Radley* v. *L. & N. W. Railway Co.* (L. R., 1 App. Ca. 754) or *Tuff* v. *Warman* (5 C. B., N. S. 573; 27 L. J., C. P. 322) are not only landmarks of the law, but make the doctrine easier for the student to realise.

In this edition useful sections have been added on the Negligence of Trustees, Directors of Companies, and Stockbrokers, as well as on the Employers' Liability Act. The judgment of Brett M.R. in *Heaven* v. *Pender* (11 Q. B. D. at p. 506) is set out in an appendix, as well as interesting comments by Lord Bramwell on the case of *Clayards* v. *Dethick* (12 Q. B. 439), apparently a fuller form of his remarks in *Lax* v. *Darlington* (5 Ex. D. at p. 35). We should have been glad to have the author's opinion on the effect of *Heaven* v. *Pender*; a case of special interest as an example of the combination in our law of the judicial theory of *jus dicere* with the fact of *jus dare*. It does not seem to us possible to reconcile the principle there laid down by Brett M.R. with the case of *Winterbottom* v. *Wright* (10 M. & W. 109). If accepted as a governing principle at all, it must be subject to limitations which in turn require careful definition; otherwise the inconveniences would follow which were indicated by Byles J. as counsel in the argument of *Winterbottom* v. *Wright*. The general rule of responsibility for oneself and one's servants, though sometimes harsh in operation, is intelligible; when it is sought to extend responsibility to the acts of people who are not one's servants, the extension must rest on special grounds of policy limited to special classes of cases. This, if we rightly interpret the judgments, is in substance the position taken by Cotton and Bowen L.JJ. in *Heaven* v. *Pender*.

De la Responsabilité et de la Garantie (Accidents de Transport et de Travail). Par CH. SAINCTELETTE, avocat, représentant, ancien ministre. Brussels and Paris. 1884. 8vo. 258 pp.

RESERVING fuller notice of this book, we mention for the present that it deals in an independent and ingenious manner with the whole theory of liability for accidents to persons and property carried for reward, and to workmen in the course of their employment. M. Sainctelette makes sure of a distinct terminology from the outset by appropriating the word *responsabilité* to duties imposed by law, and *garantie* to those arising from the terms, express or implied, of a contract. Apparently the tendency of French-speaking lawyers has been to regard liabilities of this kind as *ex delicto* rather than *ex contractu*; M. Sainctelette endeavours to correct this tendency, thus approaching the position taken by our own Courts; but this is by no means for the purpose of diminishing the responsibility of carriers and employers. Lord Bramwell has vigorously maintained that a master does not undertake (and ought not to be deemed to undertake), as a term of the contract of service, to indemnify the servant against accidents from the risks incident to the employment. M. Sainctelette maintains with no less vigour that he does and ought. We do not collect that M. Sainctelette is acquainted with the controversy which led in this country to the Employers' Liability Act of 1880. But as that Act is temporary, and in a few years the question of continuing or amending it will have to be considered, it will be interesting to English lawyers and publicists to see how the subject is treated, under another system of law, from a fresh point of view. As to the measure of damages, on the other hand, M. Sainctelette is much more lenient to the carrier than the existing law and practice of this country or (as we understand) of France and Belgium. He would limit compensation for personal injuries to the direct physical consequences of the injury—the doctor's bill, in fact. One or two expressions look as if he would not unwillingly go back, so far as railway accidents are concerned, to a fixed scale of fines—so much for an arm, so much for an eye, so much for a tooth—like those which satisfied our ancestors' notions of civil justice under Ine and Alfred. This is put by M. Sainctelette on the ground, in itself quite modern, that the company knows nothing of the rank or profession of its passengers, and cannot be deemed to contemplate, for example, the loss of large trade profits as the consequence of a default in the performance of its contract to carry safely. In the terms of our case-law, M. Sainctelette, adopting the principle of *Hadley* v. *Baxendale*, considers that it is violated by allowing such damages as were given in *Phillips* v. *L. & S. W. Ry. Co.*

The Law relating to Works of Literature and Art: embracing the Law of Copyright, the Law relating to Newspapers, the Law relating to Contracts between Authors, Publishers, Printers, &c., and the Law of Libel. With Statutes and Forms. By JOHN SHORTT. 2nd edition. London: Reeves & Turner. 1884. 8vo. 840 pp.

THIS work, originally published in 1871 and now appearing in a second and enlarged edition, groups together a number of subjects belonging to different branches of law, but connected by the circumstance that they relate to persons engaged in literary production. The plan of the work is happily conceived and carefully executed.

The first part, comprising about one-half of the work, is devoted to the Law of Copyright. The topics are skilfully arranged in a convenient sequence, commencing with a short chapter on the nature of Literary Property. Next, are treated the conditions under which the property is protected, such as that the literary matter is not of a pernicious tendency. The question is then discussed, who may possess copyright: and the author arrives at the answer, in accordance with the opinions delivered by Lord Cairns and Lord Westbury in the House of Lords in *Routledge* v. *Low* (L. R., 3 H. L. 100); namely, that a foreigner not owing, even temporarily, any duty of allegiance to the Queen, may by publishing in the United Kingdom acquire copyright under the Act of 5 & 6 Vict. The author considers that this position is reinforced by the Naturalization Act 1870, sec. 2, and that the law as laid down by the House of Lords (under the Statute of Anne) in *Jeffreys* v. *Boosey* (4 H. L. C. 815) is practically obsolete. It is true that in *Routledge* v. *Low* Lords Cranworth and Chelmsford reserve their opinions on the general question, which was not absolutely necessary for the decision, the authoress in that case having been in Canada at the time of publication. But Mr. Shortt rightly considers that this reservation does not absolve him from indicating his own judgment upon the point raised. Next follow chapters on the property in unpublished works and on crown and college copyright. The seventh chapter, upon copyright after publication, traces clearly and concisely the steps by which the law on the subject has grown up, and gives a brief historical summary of the Copyright Acts. Next are treated, in six successive chapters, the various objects of protection by the law of Copyright—books, periodicals, engravings, dramatic and musical compositions, paintings, sculpture. Colonial and International Copyright are then dealt with, and are followed by a chapter on Transfer of Copyright. The fifteenth and sixteenth chapters contain a very careful and thorough exposition of the law upon Infringement of Copyright, and the remedies for Infringement. Exception might, perhaps, be taken to the unnecessarily frequent use, in these chapters, of the word 'piracy' as a synonym for 'infringement.' It would be a good rule for authors upon Copyright to confine the use of this word to quotations from judicial opinions. So used, it will occur frequently enough to exert a strain

upon the rules of taste and good sense. The part on Copyright concludes with chapters on the American Law, and on Copyright in Designs, topics conveniently left to the end, as only slightly connected with the main subject.

The second and third parts of the work treat of the Law relating to Newspapers, and of Contracts between Authors, Publishers, Printers, &c.

The fourth and last part of the work treats of the Law of Libel; and in a new edition of a book on this subject, the reader will naturally turn to the chapter in which the author deals with the recent charge of Lord Coleridge, in the case of *Reg.* v. *Foote*, with regard to blasphemous libels. The result is satisfactory, and this chapter may be recommended as giving a neat and fair statement of the authorities, and of Lord Coleridge's charge, with a brief and well-reasoned summing up of the author's own. His conclusion is, in accordance with Lord Coleridge's charge, that 'on a prosecution for the common law offence of blasphemy in our day, the language of the older cases does not express the rule of law now properly applicable, and that the true criterion of criminality is the manner and not the matter of the publication.' In his *addenda* the author mentions that his attention has since going to press been directed, by a pamphlet of Mr. L. M. Aspland, to the opinions given by the Judges to the House of Lords, in 1842, in the matter of Lady Hewley's charities (*Shore* v. *Wilson*, 9 Cl. and Fin. 355). The opinions referred to are those of Maule J., Erskine J., Coleridge J., Williams J., Gurney B., Parke B., and Tindal C. J. The general tenor of these opinions, and the terms of some of them, go far to support the conclusions arrived at by the author.

From these graver questions, it is a relief to pass to the lighter matter dealt with in the chapter on 'Libels on Individuals,' and to be instructed as to what, according to the decisions, a person may or may not safely say or write of his neighbour. We know that the Scribes of old held refined distinctions in these things; but our own lawyers, for the credit of their profession, can produce a few niceties to match them. It appears to be actionable slander to say that a man has the itch, but you may safely *speak* of him as a scoundrel, rascal, blackleg, rogue or swindler, unless he shows that he has sustained damage in consequence. But any one of these words *put in writing* is actionable. It is easy to imagine that Shakespeare during his apprenticeship to the law was struck with the humour of the distinction[1]; and his muddle-headed officer of the watch—'one that knows the law'—feels that there might be a salve to the sting of the opprobrious epithet, if only he had been *writ down*—an ass! It has been held libellous to publish in a newspaper, of a person who was applying for assistance to a charitable society, that her friends had realised the fable of the '*frozen snake*.' This may be matched by a Scotch case, which does not seem to have found its way into English text-books. A good

[1] [*Quære tamen* whether it was known in his time: see *Thorley* v. *Lord Kerry*, 4 Taunt. 355. Ed.]

many years ago a daily newspaper published a series of articles in which the name 'Snake' was applied or suggested in various ways in connexion with a highly esteemed citizen. Although there was no tangible imputation, the persistent attempt to fix the plaintiff with a ridiculous or disagreeable name was held actionable; and to the best of the writer's recollection, an interdict was granted.

Altogether, Mr. Shortt's work may be recommended both to the profession and to all who are concerned with the law relating to literature and art, as a comprehensive, discriminating, and well-reasoned treatise, which will fully meet their requirements.

Études de Droit Constitutionnel. France — Angleterre — États-Unis. Par E. Boutmy. Paris: 1885. 8vo. iv and 272 pp.

M. Boutmy's excellent little treatise deserves an elaborate review rather than a short notice; for the book is in two respects a most noteworthy production.

It throws, in the first place, a flood of light on the new spirit which animates the rising school of French jurists. Till recent years Constitutional Law formed no part of legal education in France; Frenchmen cared little to study the ephemeral constitutions of their own country, and knew nothing about the polities of foreign states. Of this contented and pretentious ignorance M. Boutmy narrates some humorous examples. In 1793, Hérault de Séchelles enquired at the National Library for a copy of the laws of Minos; not many years back the *Recueil des chartes et constitutions de l'Europe et de l'Amérique* published as the Constitution of the United States the articles of Confederation which were abolished by the creation of the Union; and De Tocqueville, who learned to think before he learned to study, gave his authority to a translation of the existing Constitution of the United States which makes absolute nonsense of its provisions. The new school of French jurists, of whom M. Glasson and M. Boutmy are distinguished leaders, represent a most valuable reaction against the tendency towards hasty and ignorant generalisation which characterised their predecessors. Every page of M. Boutmy's little book shows careful investigation into facts and a firm faith in the historical and comparative method of studying constitutional problems. We do not say that the book contains no errors, but it certainly gives in the main as accurate an account of English constitutionalism and American federalism as we have ever met with in the works of a foreigner. If M. Boutmy has many followers we may soon see in France a body of jurists who combine German learning with French lucidity.

In the second place, these '*Études de Droit Constitutionnel*' set in a new and often very instructive point of view the Constitutions both of England and of the United States. No author we know of has brought out with so much clearness as M. Boutmy the essential points both of likeness and of difference between the constitutionalism of England and the constitutionalism of America: no

writer has drawn so tersely and yet so clearly the exact points of contrast which divide the ready-made logical and so to speak manufactured constitutions of the Continent from the irregular, gradually developed, and self-made Constitutions of the Anglo-Saxon race. The contrast between polities grounded on custom and polities grounded on law is one which will never be forgotten by any student of M. Boutmy's pages.

A. V. D.

Chitty's Equity Index. 4th Edition. Vol. II. 'Barbadoes—Education.' By W. F. Jones, B.C.L., M.A., and H. E. Hirst, B.C.L., M.A., both of Lincoln's Inn, Barristers-at-Law. London: Stevens and Sons. 1885. Large 8vo. 1038 pp.

When the third edition of 'Chitty's Equity Index' was published in 1853, it was still possible by digesting only the decisions contained in the Equity, Privy Council, and House of Lords Reports, to collect all the cases on almost every subject which would engage the attention of an Equity Judge. But in these days, when there is scarcely a point of law which may not have to be considered in the Chancery Division, that is impossible; indeed, it is not so much an Equity Index as a 'Complete Case Law Digest' that is now wanted. It may with some truth be said that in 'Chitty's Equity Index' and 'Fisher's Common Law Digest' all the case law will be found, but before one can be certain of having all the decisions on any given subject both works must be searched. In the absence of one digest of all our case law we must be content to have the subjects divided between these two excellent works, although we cannot help feeling that both are materially injured by the observance of that division beyond 1875.

The present volume of Chitty's Index begins with 'Barbadoes,' ends with 'Education,' and includes among others the titles 'Bills of Sale,' 'Charity,' 'Company,' 'Copyright,' 'Covenant,' 'Deeds,' 'Distribution of Estate,' 'Easement,' and 'Ecclesiastical Person and Property.' The task of incorporating all the cases decided in the Equity Courts during the last thirty-two years is of itself a heavy one, but the editors are doing more than that; they are adding new titles and judiciously recasting many of the old ones. The cross references are now very numerous, indeed almost all that can be desired; and much discretion is shown in the rearrangement of titles and sub-titles, although in some instances the alphabetical order of sub-titles has been unnecessarily departed from. The addition of the date to each case would have been a great advantage, and probably in the more general titles, such as 'Company,' the use of heavier type for the sub-titles and more distinctly different kinds of figures would have been better.

Lockyer v. *Vade* (Barnardiston's Chancery Rep. 444) seems to have been overlooked. It should be digested on p. 1998 next to *Ross's Trusts*; and *Crawcour* v. *Salter* (18 Ch. D. 30) should be again referred

to on p. 1084, after *Re Crawcour*. If, with the last volume, the Editors find it necessary to give a list of addenda, &c., the following cross references should be included: 'Collusion,' 'Copies' (see especially *Re Wade & Thomas*, 17 Ch. D. 348); 'Copyright,' see 'Defamation;' 'Defamation,' see 'Copyright;' 'Cremation,' see 'Ecclesiastical Person and Property.'

The Editors have in our opinion fulfilled all they promised, but the plan of the work must have hampered them a good deal. That plan is at once too wide and too narrow to be completely satisfactory. By 'too narrow' we mean that cases which ought to have been included have been deliberately excluded; to illustrate this we will point to the titles 'Bills of Sale' and 'Company,' from which by the plan of the work the decisions of the Common Law Courts are excluded. By 'too wide' we mean that many cases decided in the Courts of Equity are included, which ought to have been excluded, either because they are useless or because they are practically Common Law cases; the titles 'Bills of Exchange, &c.,' 'Colonial Law,' and 'Descent of Estate-Custom of London and York,' are open to this objection. On the whole, however, the present edition of Chitty's Equity Index will cover ground not occupied by any other Digest, and cover it well.

The Patent Laws of the World, collected. Edited and indexed by ALFRED CARPMAEL, Solicitor, and EDWARD CARPMAEL, B.A., Patent Agent. London: Wm. Clowes & Sons. 1885. 8vo. 696 pp.

THIS work brings together a mass of information, hitherto not readily accessible. The Messrs. Carpmael in making available for popular use the labour they have undertaken as essential to the efficient conduct of their own business in advising upon patent rights have acted with a generous and commendable public spirit.

The collection now published contains *in extenso* the Statutes or Ordinances upon patents in the various countries which use them. Formerly the Commissioners of Patents published from time to time the text of colonial, and translations of foreign laws. But they have for some years discontinued the practice, and the information to be obtained from their publications has become untrustworthy as well as incomplete. In the present collection the gaps left by the Commissioners have been filled up, the translations in most cases revised, and the laws of the more important European countries retranslated. The Index is so constructed as to enable the reader easily to compare the different laws on any particular point.

Apart from its interest to those immediately concerned with inventions, there is in such a collection an element of considerable general interest. The countries which have, or profess to have, a patent law, comprise in fact (with the exception of Holland and Switzerland) the world of modern civilization. As England long held an unchallenged lead in industrial progress, so the English patent law has formed the basis from which the patent law everywhere else has grown up; and the principles which in England are

partly the result of ancient constitutional limits to the power of the Crown are in most other countries embodied by express enactments of comparatively recent date.

In England the Common Law and the Statute of Monopolies (21 James I.) established the principle that the power of the Crown to grant a monopoly, and therefore the validity of the grant itself, is conditioned upon the grantee being the first and true inventor of a new process or manufacture described in the grant. The specification, particularly describing the invention so as effectually to disclose the process, was first required by the law officers who advised the Crown in the time of Queen Anne. It was at that time the struggle of inventors to get a 'patent,' and keep the invention a secret. The power of the Crown to allow disclaimer, and in certain cases a prolongation of the term of the patent, was conferred by express statute in 1835 and 1844. The Act of 1852 retained much of the cumbrous procedure of the Crown Office, which has now been reformed, by the light of experience, under the Act of 1883. Throughout the changes in the law, the principle has been maintained which makes the grant conditional on the novelty of the invention. The principle has been amply justified by experience, and is the essential basis of the patent laws everywhere.

On other points the practice is various. In most countries, following the English example, the preliminary examination is confined to the points that the documents of the applicant are intelligible and comply with the prescribed requirements. In some countries, of which the most important are the United States and Germany, this examination extends to the novelty. According to the evidence given before the late Patent Commission the latter practice is open to great objections. The practice in Germany, according to the evidence of the late Dr. Siemens, tends to the refusal of patents for really great inventions. In America the practice is fairer to inventors, but is, from the nature of the case, of doubtful efficiency. The real advantages of the American system are due to the liberality with which the Patent Office is maintained by Congress, and the completeness of their publications and facilities for information.

The rule that the claim of too much wholly vitiates the patent, though originally the consequence of a strict rule of English law applying to a grant in excess of the power, is very generally adopted. But on this point, and on the consequential requirements as to amendment and disclaimer, the rules of different countries show much variety. The more elastic rules in the United States have their influence in the style of American specifications which, if made the ground of an English patent, are apt to lead to trouble through the multiplicity of novelties claimed. This is a point which deserves more attention than it has usually received in adapting specifications to the different systems under which the patent is applied for.

Perhaps the oddest laws are those of the countries which grant so-called 'patents,' with the option of keeping the invention *secret*

during the whole term of protection. It need hardly be said that these countries are not conspicuous for progressive industry.

The systems in France and Italy, where the grant is made expressly 'without guarantee,' are remarkable for simplicity of forms. In this respect however, the palm is borne by Barbados, where the inventor has nothing to do but to file a complete specification and pay the fees at his own risk. The triumph of red tape is perhaps with Austria, where the documents undergo three formal examinations by different sets of officials. The applicant however has the satisfaction of having his fees returned if the application is rejected.

The principle of compulsory licence appears to have been first adopted, in a somewhat crude form, by Germany (1877). By the law of Luxemburg (1880) a licence is compulsory if declared necessary, by Government order, for the public interest. And there is a provision for ascertaining the terms by judicial decision. The principle is now adopted in the United Kingdom by the Act of 1883, and it is left to the Board of Trade to order the licence to be granted and to settle its terms. This is an example not unlikely to be followed by other countries in the future.

Commentaries on Equity Jurisprudence. By Hon. Mr. Justice Story, LL.D., sometime one of the Justices of the Supreme Court of the United States. First English Edition, by W. E. Grigsby, LL.D. (Lond.), B.C.L. (Oxon.), &c. London: Stevens & Haynes. 1884. Large 8vo. lxxiii. and 1093 pp.

It is probable that the magnitude of the subject with which Mr. Grigsby has attempted to deal is such that no work limited to a single volume can satisfactorily deal with it. It is difficult to see what purpose Mr. Grigsby's work can serve. The additions made to the text and notes in the recent American editions are cut out, and we have the original Story, *plus* Mr. Grigsby. Much valuable and useful matter, even to an English practitioner, is thereby lost. Moreover its place is not supplied. There is a wide chronological gap between Story and Grigsby. Their respective work is not sufficiently distinguished for the unlearned. It is either amusing or misleading to read that 'both the courts of common law and the court of probate have cognizance of administrations; and many suits respecting the administration of assets are daily entertained therein,' without any note or comment to indicate that the description is not perfectly accurate in England at the present day. And in the notes we have the most ancient and the most modern cases cited without any distinction showing which are cited by Story and which by Mr. Grigsby. Then Mr. Grigsby's work, when detected, is in many cases totally inadequate. We are for instance left in ignorance whether full payment of the purchase-money for land will take a case out of the Statute of Frauds, inasmuch as Mr. Grigsby's book gives us nothing later than the 'striking remarks' of Lord St. Leonards in the *seventh* and *tenth* editions of his 'Treatise

on Vendors.' One would have imagined that if later editions by the author himself omit the 'striking remarks,' Mr. Grigsby might well have done the same; while if not, then the later editions should have been quoted. 'Part-performance' is not a title which appears in the Index. Nor is 'Retainer' by an executor. The law relating to the rebuttal under the 'loco parentis' doctrine of resulting trusts, so far from being brought down to August 1884, as the author's preface would lead us to expect, is illustrated only by a judgment in Cox, and a reference to Keen. It is to be greatly regretted that a book of such international reputation as Story's Equity Jurisprudence should have attracted Mr. Grigsby's ambition. But the views expressed in Mr. Grigsby's preface concerning the effect of recent legislation show such an entire want of practical experience in the writer that there is, we trust, no reason to fear that the reputation of our English lawyers will suffer in the eyes of Americans through Mr. Grigsby's treatment of their great jurist.

Mr. Grigsby's name is followed by a goodly list of academical honours. Such honours ought to be the pledge of serious professional achievement, and so far from mitigating criticism, entitle us to expect that the wearer of them will justly and truly fulfil their promise. There is no substitute for honest and thorough work in any science or art whatever, and least of all in law.

The Law and Practice of Compensation for taking or injuriously affecting Land, with an Introduction, Notes, and Forms. By S. Woolf & J. W. Middleton. London: Wm. Clowes & Sons, Limited. 1884. 8vo. 810 pp.

This is essentially a practitioner's book, and as such there is no doubt of its value. It is full and, so far as we have tested it, accurate, and though from one point of view it is rather a clumsy work, this is a consequence of the subject and the mode of treatment. Unlike Mr. Cripps's smaller but more polished and elaborate work, this book is simply a collection of the Acts which are connected with the question of compensation for the taking of land, with notes to the several sections. As there are nearly eight hundred pages of Statutes and notes, it must be confessed that it is a somewhat undigested mass. For the introduction consists of some seventy pages, not included in the general paging of the volume. Though called an introduction, it is in fact a very concise epitome of the contents of the book, but it is so short as really not to be of value to the practitioner, who will go at once to the main body of the work for assistance. It would indeed have been better omitted, since any one who desires a bird's-eye view of this branch of the law will seek it in other works. There are more than twenty-three Statutes set out, including not only our old familiar friend the Lands Clauses Consolidation Act 1845, but newer acquaintances, such as the Artisans' Dwellings Act 1868–1882, and the Public Health Amendment Act 1883. The authors' modus operandi is to set out the Acts in full and then to give in a note—more or less

lengthy—the necessary explanations, cases, and references. One obvious criticism on the cases is that they have been heaped into the notes somewhat too lavishly. A book such as this is not intended to take the place of Fisher or the Law Reports Digest, but over and over again there are a string of cases given without discrimination. Thus, on p. 188 it is said, 'Promoters will be restrained from entering upon lands until they have settled with all persons having interests in the lands of which the promoters have notice.' To support this simple but rather obscurely worded proposition no less than five cases are given, without any explanation as to whether they differ or not. It is enough to give this one instance, but this fault has certainly increased the size of the book unnecessarily. There are also some sections of the Acts which might with advantage have been omitted, such as sects. 3 and 4 of the Artisans' Dwellings Act 1875, the effect of which not being material to the subject of Compensation could have been stated in a few words. But these criticisms in detail do not affect our general statement, that this book is one of considerable value to practitioners, while its compilation shows very great industry, research, and care on the part of its authors.

A Treatise on the Law of Evidence. Eighth Edition. By His Honour Judge Pitt Taylor. London: W. Maxwell & Son. 1885. 2 vols. 1935 pp.

Judge Pitt Taylor finds a melancholy satisfaction in the reflection that he does not intend himself to bring out any further edition of his standard work on Evidence. Indeed he tells us that when he considers the difficulties 'strewn in my path by the peculiar embranglement of recent legislation, I can only marvel at my own intrepidity in venturing to prepare for the press an Eighth Edition.' Among the more conspicuous of the recent pieces of legislation of which Mr. Pitt Taylor has had to take account in preparing the present edition, are the recent Acts relating to Bankruptcy, Bills of Exchange, Bills of Sale, Corrupt Practices, and Married Women's Property, as well as the Rules of the Supreme Court, 1883. There is perhaps not very much in these enactments, and the others referred to in the preface, which directly affects the law of what is evidence, or of how it is to be given, but as it is Mr. Pitt Taylor's method to state loosely every part of the law of England which can, so to speak, be looked at from an evidence point of view, it is not difficult to understand that the work must have been laborious. As far as appears, what is new has been woven into a place which does for it well enough in a book which makes no pretence to scientific or indeed to any arrangement. The value of such books must always depend principally upon the index, and most people who have had occasion to make practical use of it know that Mr. Pitt Taylor's index is excellent. Whoever prepares the ninth edition will be able to cite the recent case of *Reg.* v. *Cox & Railton* in proof that the author's anticipation on the subject of professional

privilege invoked for the protection of crime (p. 784) is perfectly correct. On the other hand, he may repair Mr. Pitt Taylor's omission to refer in appropriate places to the Explosives Act, 1883, the fourth section of which not only throws the burden of proving a lawful intention on a prisoner charged with being in possession of an explosive substance, but also makes every such prisoner as well as his wife or husband a competent witness in the case. Perhaps however we may hope that before that time the competence of accused persons to give evidence will have been made the rule and not the exception.

Some Leading Principles of Anglo-American Law expounded with a view to its Arrangement and Codification. By HENRY T. TERRY, Professor of Law in the University of Tokio, Japan. Philadelphia: T. & J. W. Johnson & Co. 1884. 8vo. xxxv and 686 pp.

MR. TERRY'S aim has been to expound the Common Law, of which the present formless condition is in his opinion 'fast becoming unbearable,' in such a scientific arrangement as may lighten the student's labours and help to point the way to ultimate codification. He has apparently been more influenced by Austin than by any other theoretical writer, but he is alive to the need now generally felt of at least tempering Austin's dogmatism. Mr. Terry carefully points out that 'any one who seeks a definition of law will have to frame it according to the purpose for which he wants to use it,' and accepts Austin's definition only as being 'in the main correct' with reference to 'the highly developed conception of law that prevails in the most advanced societies.' Likewise he has used Judge Holmes's work (perhaps the best corrective of Austin yet extant) with good effect: and he is not afraid of using the old forms of action as symbols, even as tests, of real distinctions in principle. So far as we have looked into Mr. Terry's handling of his matter in detail, it appears decidedly good. He does not shuffle off difficulties under the cloak of authority, but resolutely attacks such problems as that of separating the elements of tort and of contract in the class of cases where the facts are capable of producing a cause of action of either kind: a problem whose difficulty will be appreciated by any one who has tried to reconcile *Alton* v. *Midland Ry. Co.*, 19 C. B., N. S. 213, 34 L. J., C. P. 292, with *Foulkes* v. *Metrop. Dist. Ry. Co.*, 5 C. P. D. 157. Mr. Terry seems to think *Alton* v. *Midland Ry. Co.* was wrongly decided, or decided on unsatisfactory reasons; and his view is—since the last-mentioned case at any rate—well entitled to consideration.

The final 'suggestions about codification' contain some severe but just criticism of the draft Civil Code of New York. To the ignorant demand for greater simplicity Mr. Terry forcibly answers, 'The law cannot be made simple without being made barbarous:' and (with all recent writers who have treated the subject rationally) he warns the reader that no code can be made complete or final. He thinks it would be possible in America to

frame a code, or codes, by means of a carefully selected Federal (or even mixed British-American) commission, which could be applied by Congress to the District of Columbia and the Territories, and adopted by the several States if and so far as it was commended to them by its merits. Possibly some of our children may live to see the fulfilment of this pious wish.

Meanwhile Judge Chalmers has been addressing the law students of Birmingham on the more immediate possibilities of codification (Jan. 16: the address is published by Houghton & Co., Birmingham), and seems not unhopeful. The draftsman of the Bills of Exchange Act will at all events not be charged with want of practical experience.

Without committing ourselves to the classification adopted, we think Mr. Terry's work very sound and useful. The only material objection we have to make is that he is rather too fond of inventing new terms of art.

The Law relating to Gas and Water; comprising the rights and duties as well of Local Authorities as of Private Companies in regard thereto; and including all legislation to the close of the last Session of Parliament. By W. H. MICHAEL, Q.C., and J. SHIRESS WILL, Q.C. Third Edition, by M. J. MICHAEL. London: Butterworths. 811 pages.

THIS book is arranged on a plan which is very convenient where the amount of case-law is relatively small, and the numerous statutes on the subject form by no means an harmonious whole. It begins with an introduction, in this edition considerably enlarged and partly re-written, containing a slight history of the course of legislation as to gas and a synopsis of the existing law as to both gas and water supply, with marginal references to the subsequent pages of the work. Then follow the various statutes relating to the subject, set out in convenient order, with full notes of the decisions. The notes to some of the sections cover such a wide field that it seems a pity not to divide them under various headings more clearly than can be done by marginal notes. Such, for instance, are the notes on Compensation, etc. (pp. 191–220), and those which are appended to the 75th section of the Waterworks Clauses Act of 1847 (on the limitation of profits), dealing with the Rating of Waterworks (pp. 263–270).

The editor has added in their appropriate places the few cases relating to the subject which have been decided since the last edition in 1877. He should not have cited (at p. 205) *Cooke* v. *Chilcott* (3 Ch. D. 694) as being an unquestioned authority: see *Haywood* v. *Brunswick Permanent Benefit Building Society* (8 Q. B. D. 403), but with this exception the cases have been correctly noted up. The Public Health (Water) Act 1878, the Public Health (Support of Sewers) Amendment Act 1883, and the Lands Clauses (Umpire) Act 1883 have been set out in full in this edition, as well as the Regulations of the Local Government Board with regard to

Provisional Orders and the Circular of the Board to Local Authorities under the Rivers Pollution Prevention Act 1876; and the changes effected by the Summary Jurisdiction Act 1884 in the proceedings provided by statute for the recovery of penalties by Gas and Water Companies have been carefully noted.

Altogether, the book is a most useful and full collection of the statute and case law as well as of practical information relating to the subject in all its branches.

The Principles and Practice of Discovery. With an Appendix of Forms. By EDWARD BRAY, of Lincoln's Inn, Barrister-at-Law. London: Reeves & Turner. 1885. 8vo. xlix and 704 pp.

BOOKS of practice are presumably not meant to be read through; nor is it easy to form an opinion of their merits on a first perusal. So far as we have been able to test Mr. Bray's work it is sound and thorough, and well adapted for its purpose. The rules laid down in some hundreds of cases are stated as far as possible in the words actually used by the judges; and an extremely elaborate system of cross references from one part of the book to another will probably be found useful by those who consult it for practical purposes. It is not possible to explain the present law of discovery without inquiring into the ancient practice of the Court of Chancery and the Common Law Courts. Mr. Bray's work is therefore not without interest for the student of legal history. At p. 264 he gives an account of the practice of Profert and Oyer, abolished by the C. L. P. Act 1852, and of the equitable powers assumed by the Common Law Courts in the last century, when they allowed a party to inspect documents in his adversary's possession to which he was himself a party in fact or in interest. The merits of Mr. Bray's book have been cordially recognised by Kay J. See *Foakes* v. *Webb*, L. R., 28 Ch. D. at p. 290.

The Practice as to Letters Patent for Inventions, Copyright in Designs, and Registration of Trade Marks under the Patents Designs and Trades Marks Act, 1883, &c. By WILLIAM NORTON LAWSON. London: Butterworths. 1884. 8vo. 380 pp.

THIS is a very careful and well-digested commentary on the Act of 1883. The text is arranged, on the principle adopted in Mr. Buckley's well-known book on Company Law, under the various sections of the Act to which the special matter more particularly relates. It is a method of arrangement which has been too often adopted to cover slip-shod and hasty work; but where the work is done thoroughly and well, as in Mr. Buckley's book and in this one of Mr. Lawson's, the system has considerable advantages.

If there is one part of his book on which Mr. Lawson has bestowed

special pains, we should say it was that which relates to the various points of practice in an action for infringement of patent. On all that relates to the conduct of a patent action the book seems to leave nothing to be desired. The notes to section 29 of the Act contain a very complete analysis of the requirements as to pleadings and particulars specially relating to patent cases; and those to section 30 are perhaps not less valuable as bringing together the authorities upon the practice specially relating to patents in regard to interlocutory applications.

The Board of Trade Rules are set out *in extenso*. The Appendix contains a well-selected set of specimens of orders of various kinds, forms of particulars in patent actions, and form of petition for extension. The Index is adequate and conveniently arranged.

Although the author in his preface modestly disclaims the attempt to make his book a treatise on the Law of Patents generally, his book is more than a mere book of practice. Indeed, if we except questions of *novelty*, which in themselves might form the subject of a separate treatise, it would be difficult to find a book containing a greater amount of sound information upon patent law.

A Treatise on the Law of the Statute of Frauds, and of other like enactments in force in the United States of America and in the British Empire. By HENRY REED. Philadelphia: Kay & Brother. 1884. 3 vols. 8vo. x. and 773, vi. and 631, iv. and 554 pp.

THE sage Manu wrote a book in 100,000 couplets and delivered it to Narada. Narada said, 'This book cannot be easily studied by human beings on account of its length.' He made an abridgment of the book in 12,000 couplets and gave it to his disciple Sumati, who in turn abridged it to 4,000. 'It is only the gods who read the original code. Men read the second abridgment, since human capacity has been brought to this through the lessening of life.' Perhaps the lawyers of Philadelphia are as the gods. We are but mortal, and we do not expect to master Mr. Reed's exhaustive treatise on the Statute of Frauds, unless it finds a Sumati in our lifetime. In seriousness, a treatise on this scale is in truth as much a work of reference as a lexicon, or as Fisher's Digest itself. As far as we can tell from a cursory inspection, Mr. Reed, assisted by other learned persons whose names he gives in the prefaces to vols. 1 and 2, has done a thorough piece of work which should save much toil (especially in America) to those who come after. Most if not all of the States have adopted the Statute of Frauds either as it stands or with more or less verbal revision. Their several Statutes are given by Mr. Reed in an Appendix. Analogous doctrines of other modern systems (such as the Scottish *rei interventus* in the matter of part performance) are cited for illustration, though the main object is to give a full digest of English and American decisions. There is also a chapter of historical introduction. The statement that Chief Justice Scroggs 'achieved his reputation rather as a criminal

jurist than a civil one' savours of a grim humour commonly associated with lands farther West than Pennsylvania. We have heard a not wholly dissimilar example of *litotes* from a Western Territory: 'Our jail is very weak, and we have no use for any of the men on this list,' said the president of a Vigilance Committee to an officer of Texan Rangers whose services had been called in. We do not think that any note or memorandum in writing was made of this remark, and we are therefore unable to vouch for its textual accuracy.

The Yorkshire Registries Act, 1884, *with Rules and Forms, &c.* By Reginald J. Smith. London: Clowes and Sons, Limited. 8vo. pp. xx and 88.

The Yorkshire Registries Act, 1884, does much more than consolidate previous Acts. It is a strenuous attempt to make the Register a complete guide to the title of every plot of land. For this purpose the old equitable doctrine of notice, which has done so much to nullify prior Acts, is rigorously abolished; so is the doctrine of tacking, and the 'tabula in naufragio' of the legal estate will no longer be available where the Act applies.

One notable feature of the Act is the complete publicity which it enforces. Any one may search the registers, and any one may make copies or extracts therefrom, though, oddly enough, by a rule of the county authorities, i.e. the Justices, extracts must be made in pencil only (Rule 5, *op. cit.* p. 42). The history of conveyancing is in one view little else than a history of shifts to avoid publicity, and it is conceivable that some device may be found to evade the Statute in this respect. How so stringent a law will work remains to be seen: and the experiment is evidently of more than local interest. Should the system fully succeed in Yorkshire, it may be asked, why should it not succeed throughout England? Varying a well-known county proverb: What Yorkshire thinks to-day, England may possibly think to-morrow.

We notice that Mr. Smith seems to think (*op. cit.* p. 4) that it will be useless to register a voluntary assurance under the Act. If we are right in so understanding him, we do not agree; such registration would be valuable, at all events, as against later voluntary assurances by the same grantor or settlor. On the whole, however, Mr. Smith's criticisms are intelligent, and his introduction and notes perspicuous; and we feel little doubt that this handbook will command a deserved popularity in the districts which it concerns.

La nouvelle loi sur les sociétés anonymes en Allemagne. By Arthur Raffalovich. Paris. 1884. Pamphlet.

The manifold labours of the Germans resulted last year in a new law regulating Joint Stock Companies, of which, and of previous German legislation on the subject, the essay of M. Raffalovich gives an interesting résumé. The legislative question arising as to Companies is the extent to which a benevolent

government should protect its children against the snares of promoters. In England the public is still left very much to its own wisdom or folly; the law exacts little from promoters save the setting forth of a prospectus which must not carry imagination into the realms of the strictly untrue. The Germans have passed from the early system of strict concession and control by Government, through a period of relaxation, to the present law, which subjects companies to a surveillance more stringent than any which has existed since the law of 1870. The relaxation of the law in 1870 was preceded and followed by a period of industrial expansion in Germany, artificially furthered by the influx of the five 'milliards' from France. To this succeeded a period of contraction, during which many of the bubble companies which had been started suffered shipwreck, and the Germans were taught by experience of what deeds the unchecked promoter is capable. Guided by this experience, their legislators have now surrounded with precautions the birth of companies. It is the duty of the Registrar before sanctioning a company to see that its contract of association is in conformity with the numerous requirements of the new law. All the capital must be subscribed and in part paid up before the company can be registered. The prospectus, which is carefully regulated, is embodied in the statutory form of application for shares. It seems probable that future legislation in England will take the shape of greater control of companies by the representatives of the public interest. Sir John Lubbock's present Bill, for example, is based on the principle that the objects of the intended company should be more explicitly set forth.

The Powers, Duties, and Liabilities of an Election Agent and of a Returning Officer at a Parliamentary Election in England or Wales; with a Table of Election Statistics, an Appendix of Forms, and all the Statutes required during an Election. By FRANK R. PARKER, Solicitor and Parliamentary Agent. London: Knight and Co. 1885. 8vo. xxxvi. and 686 pp.

THIS work will be found a most valuable guide through the intricate labyrinth of Statute Law to be threaded in English Parliamentary Elections. The powers, duties, and liabilities of Candidates, Election Agents, and Returning Officers are clearly set forth in full and practical detail. The author has done his best to give explicit and safe instructions, and to save trouble to those who will use his book in a time of pressure. His work is sound and thorough, and contains a very complete appendix of forms. On occasion he has not been afraid of repetition, and his index is full and good.

He also gives an appendix and a conveniently arranged table of Statutes. Another appendix, made somewhat obsolete by the Redistribution Bill, contains interesting statistics of the general election of 1880, and contrasts the actual expenses of the candidates with the maximum allowed by Sir H. James's Act.

A Digest of the Law of Husband and Wife as it affects property, and the Married Women's Property Act, 1882, with Notes and Illustrations, with Appendix of Statutes, Forms, and Precedents. By R. THICKNESSE. London: H. Maxwell & Son. 1884. 8vo. 461 pages.

THIS is stated to be 'in lieu of a second edition' of the author's work on the Married Women's Property Act, 1882, and it is in fact a new work, Mr. Thicknesse having re-cast his commentary in the form of a codified Digest, with articles, exceptions, and illustrations. It may be doubted whether this subject is in so fixed a state as to be quite ripe for codification. Thus the first article lays down the rule that the contract of marriage makes husband and wife one person and that the personalty of the wife is merged in that of the husband, but there follows a very large exception to this in the case of women married after January 1, 1883. Which is the exception and which is the rule it is as yet not easy to say. Apart from these inherent causes of difficulty, Mr. Thicknesse's exposition is clear and even elegant, and as far as we have tested his law it seems to be correct. He has been diligent in distinctly conceiving the various questions that may arise out of the present transitional state of the law of married women's property, and in indicating the probable solution where such conjecture is prudent. We have been accidentally prevented from submitting Mr. Thicknesse's book to a detailed and critical examination; but our general impression of it is a favourable one, both as to matter and as to form.

A Concise Treatise on the Law of Marriage Settlements, with an Appendix of Statutes. By HENRY THOMAS BANNING. Stevens & Sons. 8vo. 320 pages.

MR. BANNING calls his little book 'A Concise Treatise on the Law of *Marriage* Settlements,' but it is really a collection of notes on various matters relating to settlements generally. The space which is given to such subjects as 'Frauds on Marital Rights,' 'Marriage Brokage Contracts,' 'Parental Influence,' and 'Voluntary Settlements,' would have been better devoted to subjects more peculiar to marriage settlements, for there are more omissions than we expected to find in a book by the author of the work on 'The Statutes of Limitation.' Among the omissions may be mentioned the following. The question whether on the second marriage of, and settlement by, the surviving parent of children, such children are within the marriage consideration, is dealt with on page 5, but that the answer may depend on whether the surviving parent is the father or the mother is not suggested, although the judgment of Fry J. in *Gale* v. *Gale* is referred to. The 4th section of the Statute of Frauds is discussed, but the question how far a parol agreement made upon consideration of marriage can be set up by subsequent

recognition in writing is not mentioned. In the chapter on Ultimate Trusts the meaning of the word 'unmarried' is considered, but no reference is made to *Emmins* v. *Bradford* (13 Ch. Div. 493) or *Dalrymple* v. *Hall* (16 Ch. Div. 715); and the omission of *Meinertzagen* v. *Walters* (L. R., 7 Ch. 670) from the chapter on Satisfaction is almost as remarkable as the omission of *Honywood* v. *Honywood* (L. R., 18 Eq. 306) and *Baker* v. *Sebright* (13 Ch. Div. 179) from page 167, where waste by cutting timber is discussed. The book does not deal with failure of the objects of the trusts, but there is a chapter styled 'The Failure of the Object of the Settlement,' from which it would seem that 'the object' of the settlement is the marriage. The note on Domicile (p. 247) is strangely worded, and is too limited to be of practical use. If we have expected too much the title-page and preface have misled us. In our opinion the chief merits of the book are that it contains within a small compass much useful information relating to an important and difficult subject upon which there is no recent work; that, among the cases cited, some were reported within two months of the publication of the book; and that the effect of those cases is generally accurately given.

Some Observations upon the Law of Ancient Demesne. By PYM YEATMAN. Sheffield: Leader & Sons; London: Mitchell & Hughes. 1884. 8vo. 73 pages.

THE competence of the author of this tract to deal with his subject will be plainly apparent to any one who will read the following remarks:—

'Before dismissing this subject, reference must be made to the famous statute of Charles II, commonly called the Statute of Fines and Recoveries. At that period, just as at the present day, all true knowledge of the subject of ancient demesne was lost; men's minds were intent upon the destruction of everything bearing the remotest relation to feudal tenures, and it was supposed, because this tenure was of an ancient character, that it was necessarily open to objection, and an attempt was made to prevent the operation of the laws cited by Coke and Fitzherbert, by which these rights were restored, but inasmuch as the framers of the Act knew no distinction between the Royal and the private rights of these tenants, they omitted all mention of the former, and as it is a rule in the construction of statutes that the rights of the Crown are not touched unless especially named, it would seem that the statute is wholly inoperative, so far as regards tenants of ancient demesne of the Crown of England.'

It would seem then that Mr. Yeatman's researches have discovered a famous statute of which all true knowledge had been lost, unless indeed Wards and Liveries are commonly called Fines and Recoveries, or Charles the Second is commonly called William the Fourth. That the statute is wholly inoperative as far as regards tenants of ancient demesne and all other persons we can somewhat readily believe.

Commentaries on the Common Law, designed as Introductory to its Study. By HERBERT BROOM, LL.D. Seventh Edition, by W. F. A. ARCHIBALD and HERBERT W. GREENE. London: W. Maxwell & Son. 1884. 8vo. 1129 pp.

IN this, the first edition since Dr. Broom's death of his text-book on the Common Law, his editors have made such additions and alterations as changes in the law since 1880 have rendered necessary. The discussion of the law relating to Married Women and Employers' Liability has been expanded by a clear statement of the effect of the recent statutes; the chapter on Negotiable Instruments and the section on Action at Law have been carefully revised and reconstructed with reference to the Bills of Exchange Act 1882 and the Rules of the Supreme Court of 1883; the treatment of Easements has also been enlarged and improved; and the effect of recent cases, where needful, has been gathered into the text.

In short, the work of re-editing has been well done, assuming that it was worth doing at all: as to which we do not feel called upon to express an opinion.

Probate and Administration Law and Practice in Common Form and Contentious Business. By W. JOHN DIXON. Second Edition. London: Reeves and Turner. 1885. 8vo. 630 pp.

THIS edition is in many respects a great improvement upon the first. The length of the book is reduced by a third without the sacrifice of any material portion, and the various Probate rules are cited in full in the footnotes under the headings to which they apply instead of in a separate appendix. There is still, however, great room for improvement, as there seems no use in printing the Supreme Court Rules of 1883 very nearly in full under 'Practice,' and so occupying space which would be better filled by a more careful statement of the special practice in Probate. The work would also be improved by fuller explanation of the practice of the County Courts, and as to Scotch Confirmations and Irish Probates. Probate duties and proceedings within the Customs and Inland Revenue Act 1880 might be treated of with advantage.

Mr. Dixon has on many points cited the authorities very fully, but elsewhere he has omitted decisions which ought to have been cited (e. g. *Noble* v. *Phelps* and *Willock*, L. R., 2 P. & M. 276, as to wills of married women). Some of the recent cases, which ought to have been referred to (e. g. *In the Goods of Prince Oldenburg*, 53 L. J., P. D. & A. 46, 33 W. R. 724, 9 P. D. 234), are not mentioned even in the Addenda, whilst others, such as *Threlfall* v. *Wilson*, 8 P. D. 18, are only mentioned in the Addenda, though reported in 1883.

There are numerous errors, especially in punctuation, which might have been avoided by a more careful correction of the proofs.

When a book is neither well written, well arranged, nor well printed, one cannot honestly say it is a good book. Mr. Dixon's book, nevertheless, is good enough to be useful for want of a better; and on this subject there is not a better at present.

The Complete Annual Digest of every reported case in all the Courts, for the year 1884. Edited by ALFRED EMDEN, assisted by HERBERT THOMPSON. London: Wm. Clowes & Sons. 1885. Large 8vo. 558 pp.

THIS is a useful addition to the resources available for reference to the ever-growing body of case-law. It would be rash to vouch for the authors having embodied every reported case for the year, but we cannot charge them with any omission. The order of arrangement follows, of course, the main lines of the digests in familiar use. This is a necessary condition of a book of the kind meant to be used in the hurry of practice. But the arrangement is not quite slavishly followed, and is in some instances slightly improved upon. Thus under 'Will' we have the subordinate heading 'construction,' under which the headings of 'absolute gift,' 'ambiguity,' &c. are again subordinately grouped in alphabetical order. This seems better than interspersing questions of construction with questions of 'Invalid trust,' 'Revocation,' &c. On the other hand the unwieldy head of 'Practice' is at once split up into a large number of subordinate headings such as 'accounts, &c.'; which is a distinct improvement on the method of the Law Reports Digest.

'*Morgan's Chancery Acts and Orders.*' Sixth Edition. By the Right Hon. G. O. MORGAN, Q.C., M.P., and EDWARD ALBERT WURTZBURG. London: Stevens & Sons. 1885. Large 8vo. lx. and 723 pp.

A FULL and elaborate book of practice like this can be tested only by practice. Accordingly, we shall submit this new edition (which is in substance a new book, if it bears out its professions) to that test, and report further on its merits in a future number. For once we have broken the rules of bibliography for brevity's sake, and described the book by its well-known short title.

Winding-up Forms. By FRANCIS BEAUFORT PALMER. London: Stevens & Sons. 1885. 8vo. 538 pp.

MR. PALMER'S collection of winding-up forms is a companion volume to his useful work on 'Company Precedents,' and appears to be very complete. The profession owes much gratitude to those who are at the pains to forge such necessary tools as these. The Appendix, inter alia, gives a concise bird's-eye view of the cases in which persons have either succeeded or been foiled in their endeavours to escape being settled on the list of contributories under section 38 of the Companies Act 1862.

The London Companies Commission: a comment on the Majority Report. By GEORGE H. BLAKESLEY. London: Kegan Paul, Trench & Co. 1885. 8vo. 63 pp.

MR. BLAKESLEY does not undertake to discuss the general merits of the City Companies question. But he endeavours to show, and goes near to show in our opinion, that the reasons given for their conclusions by the majority of the Commissioners are on the face of them unsatisfactory. To talk of the Companies having been first 'in effect a Municipal Committee of trade and manufactures,' and then 'an institution in the nature of a State Department for the superintendence of the trade and manufactures of London,' is intolerably slovenly to lawyers' ears (if nothing worse), when the purpose is to justify an exercise of the eminent domain of the State, by means of special legislation, over funds which are legally private property. We have no wish—indeed it is hardly within our province—to express an opinion on the main question. But if it is politic and expedient to convert to public uses property of which the Companies now claim to dispose at their own pleasure, the grounds of policy should be plainly stated as they are now conceived to exist, not bolstered up with semi-conjectural statements of something which is not history, and is not capable of ever having been law. The strictly limited plan of Mr. Blakesley's pamphlet prevents him from noticing the opinions given by Mr. Horace Davey and Mr. Vaughan Hawkins. It is needless to say (to members of the Chancery Bar at all events) that these are far more instructive and important documents than the conflicting reports and memoranda of the Commissioners.

AMONG the *Johns Hopkins University Studies* (Baltimore), 'Rudimentary Society among Boys,' by John Johnson, jun. (2nd Ser. xi, Nov. 1884), is both amusing and curious. It describes (inter alia) how the boys of a school near Baltimore have by the light of nature worked out an elaborate law of occupation and possession with regard to the appropriation of trees for bird's-nesting purposes. Mr. Johnson even reports a case in which something very like the doctrine of 'purchase for value without notice' was enforced by the primitive court in which the boys are both suitors and judges. Then butter, of all things in the world, has become a money of account among the boys; the fixed allowance of butter at meal-times ('order' as they say at Eton) being the unit. A half-butter =one cent approximately. The rise of lords and monopolies in a communal society, and the economical effects of State regulation, are also not without their illustrations in this quaint little book. 'Land Laws of Mining Districts,' by Charles Howard Shinn (2nd Ser. xii, Dec. 1884), gives an account of the conventional laws peculiar to the Western mining districts of the United States, which in some respects unconsciously reproduce the ancient custom of 'tin-bounding' still recognised in Cornwall (*Ivimey* v. *Stocker*, L. R., 1 Ch. 396).

Politics and Economics: an Essay on the Nature of the Principles of Political Economy, together with a Survey of recent Legislation. By W. CUNNINGHAM, B.D. London: Kegan Paul, Trench & Co. 1885. 8vo. ix. and 275 pp.

Christian Opinion on Usury. With Special Reference to England. By W. CUNNINGHAM, B.D. Printed for Macmillan and Co. Edinburgh. 1884. 8vo. 84 pp.

MR. CUNNINGHAM'S 'Politics and Economics' belongs, on the whole, to the reaction against individualism. It treats economical problems from the point of view of *Staatswirthschaft* rather than from that of current English doctrine. The discussion of recent economical legislation—the only part which concerns us here—proceeds in this spirit, refusing to accept any fixed dogmas whatever as to the proper limits of State action. An extract from the chapter summing up the results may give some notice of the author's ideas and method:—'Between the Merchant Shipping Act of 1876 and the Irish Land Bill of 1881' [Mr. Cunningham uses 'Bill' as a synonym of 'Act' in a rather perplexing manner] 'there is a curious parallel. Both were advocated on high moral grounds; both were introduced by ministers who had repudiated the principles on which they were based; both were passed because of the pressure of agitation outside the house; both were condemned by careful and fair critics at the time, and in both cases the condemnation has been amply justified. . . . There is great danger in seeking to do what appears right on political or social grounds unless we weigh carefully its economic bearings. The whole history of English dealings with Ireland is the history of sacrificing industrial good for political purposes—political purposes that did not seem unjust to the men who carried these measures.' In a country where both the theory and the practice of legislation are very much at the mercy of party motives, impartial and well-informed criticism like Mr. Cunningham's is always welcome. Mr. F. C. Montague's extremely well-written essay on 'The Limits of Individual Liberty'—a work belonging to the general philosophy of politics rather than to jurisprudence—is to be remarked as a like sign of the times.

We notice the other little book for the sake of the frontispiece reproduced from Blaxton's 'English Usurer.' The little devil standing on the back of the usurer's chair is as delectable a devil as we have ever seen. For the rest, Mr. Cunningham's object is to trace the development of ecclesiastical opinion from the third to the seventeenth century on the distinction between lawful and unlawful profits made by the use of capital, and to show that the mind of the Church was never out of harmony with that of discreet laymen. Mr. Cunningham tells his story well, and probably enough he is right. And his general reflections may have a legal bearing in countries where usury laws still exist. But English lawyers, as such, have now no point of contact with such a work. *Non est de nostra facultate*, as the theologian is supposed to say of grammar somewhere in the 'Epistolae Obscurorum Virorum.'

NOTES.

THE operations of the French in China may probably raise a good many questions of International Law. It seems that they have not been restrained by the usages of war as between belligerents from destroying fishing junks and obliging prisoners to assist in the construction of batteries. Their announcement that rice will be treated as contraband shows as little regard for the rights of neutrals. It is true that in the sixteenth century Queen Elizabeth, and in the seventeenth the United Provinces, took upon them to forbid the carriage of corn to Spain. But the pretension was soon much narrowed, and its apparent revival during the struggle against revolutionary France was avowedly exceptional. Thus the Order in Council of 1793, which was met with indignant protests on the part of Denmark and the United States, was excused on the ground that the corn trade of France with foreign countries was no mere private speculation, but a business immediately carried on by the 'pretended government' of that country, and on the ground that the whole labouring class of France, upon which the effects of a scarcity would chiefly fall, had been armed against the other governments and the tranquillity of Europe. All modern authorities are agreed that provisions as a rule are free. Most writers would make an exception only against provisions intended for a place blockaded or besieged, and this is doubtless what was meant by Vattel when, in a passage which has been misunderstood, he classes as contraband 'les vivres même, en certaines occasions où l'on espère de réduire l'ennemi par la faim.' The English and American Prize Courts go a step further, and allow the capture of provisions having a highly probable destination for military use, e. g. if bound for a port of military or naval equipment. (See Lord Stowell in the *Jonge Margaretha*, 1 Rob. 194, and the U. S. cases, the *Commercen*, 1 Wheaton, 382, and the *Peterhoff*, 5 Wallace, 56). A return to a harsher practice would come with a singularly bad grace from the French, whose tendency has always been in the other direction. The Ordonnance of 1681, Valin, Pothier, in fact all their best writers, are on the side of leniency. M. Ortolan goes so far as to lay down that 'les vivres et tous objets de première nécessité ne peuvent, en aucun cas et pour quelque motif que ce soit, être rangés dans la contrebande de guerre, sauf les droits résultant du blocus.'

T. E H.

WHY should not a single Court of Appeal be formed by abolishing the present Court of Appeal and turning its members into law lords? This is a question forcibly suggested by the *Appeal Cases* for March. No one can read them without seeing that the present system of double appeal has two defects. It prevents us from having the strongest appellate tribunal which has ever existed in England; it increases to an incalculable extent the uncertainty of the law. Take, for example, *Sewell* v. *Burdick*, 10 App. Cas. 74. That decision at last determines with some certainty the effect of the indorsement and delivery of a bill of lading by way of pledge. It settles that such indorsement does not pass the 'property in the goods' to the indorsee within the meaning of the Bills of Lading Act, 18 & 19 Vict. c. 111. sec. 1, and establishes the perfectly clear principle contended for by Bowen L.J. in the Court of Appeal, that the indorsement and delivery of the bill of lading like the actual transfer of goods depends for its effect, as far as the rights of the immediate parties are concerned, upon the agreement between them. If they intend to sell the goods, the ownership in the goods is transferred; if they intend simply to pledge the goods, then the goods are pledged and the ownership remains in the pledgor. But up to the 5th December last, when the judgment of the House of Lords was delivered, every one was bound to hold on the authority of the Court of Appeal that indorsement and delivery of a bill of lading by way of pledge did transfer the ownership in the goods to the indorsee within 18 & 19 Vict. c. 111. sec. 1. If Sewell had for any reason not appealed, the law might have remained uncertain for years. No blame attaches to the Court of Appeal, but one may reasonably doubt the wisdom of maintaining more than one appellate tribunal.

Seward v. *The Vera Cruz*, 10 App. Cas. 59, decides that the Admiralty Court Act 1861 (24 Vict. c. 10), sec. 7, does not give jurisdiction over claims for damages for loss of life under Lord Campbell's Act, 9 & 10 Vict. c. 93, and that therefore the Admiralty Division cannot entertain an action in rem for damages for loss of life under that Act. This determines a point of practical importance about which there have been curiously conflicting decisions. (Compare *The Beta*, L. R., 2 P. C. 447, *The Guldfaxe*, L. R., 2 A. and E. 325, *The Explorer*, L. R., 3 A. and E. 289, *The Franconia*, 2 P. D. 163, on the one side, with *Smith* v. *Brown*, L. R., 6 Q. B. 729, and *The Vera Cruz*, (No. 2), 9 P. D. 96, on the other.) In *Seward* v. *The Vera Cruz*, the House of Lords affirm the decision of the Court of Appeal, but this does not affect the consideration that the existence of a double appeal has rendered the law deplorably uncertain, and a comparison of *The Beta*, L. R., 2 P. C. 447, with *Seward* v. *The Vera Cruz*, suggests that the anomaly of maintaining two Courts of Final Appeal makes the attainment of absolute certainty as to the simplest rules of law an impossibility.

Attorney-General for Quebec v. *Reed*, 10 App. Cas. 141. This case is one of those decisions which suggest political justifications for

the maintenance of a legally indefensible anomaly. We may well doubt whether the Colonies would allow any tribunal called the House of Lords to adjudicate on such a matter as is in this instance determined by the P. C. That Court performs for the Dominion of Canada the functions discharged in the United States by the Supreme Court. They have now decided that a duty of ten cents imposed upon every exhibit filed in Court in any action depending therein is a form of indirect taxation, and that therefore the imposition of such a duty is *ultra vires* of the Provincial Legislature of Quebec; in other words the P. C. has determined just that kind of question which under a federal system of government raises the question of State rights, and therefore gives rise to the most violent political controversies. The decision will no doubt be quietly accepted throughout the Dominion, though it is open to question whether the views of the Judicial Committee on the line dividing direct from indirect taxation would command the assent of all political economists.

Last v. *London Assurance Corporation*, 14 Q B. D. (C. A.) 239, raises a point of some nicety and also of considerable interest to life assurance companies. The London Assurance Corporation distributes the annual earnings of the company partly as dividend divisible among shareholders and partly as bonuses payable to policy holders. The corporation claim that the amounts payable by way of bonus are not profits of the company but moneys expended to earn profits, and are therefore not liable to income tax. This view has been maintained first by the Queen's Bench Division and next by the C. A. If held by the H. L. it will enable life assurance companies to escape to a great extent from payment of income tax. Its correctness however is doubtful. Mr. Justice A. L. Smith dissented from the judgment of the Q. B. D. and Lord Justice Lindley from that of the C. A. There is some difficulty in seeing how moneys, the existence of which depends wholly upon the excess of income over expenditure, can cease to be 'profits' because they are divided among policy holders instead of going to shareholders.

Legal logic does not receive half the attention it deserves either from logicians or from lawyers. Every number of the Law Reports contains cases in illustration of logical problems, and the riddles which perplex the Courts might be much simplified by attention to the elements of logic.

Thus the Judges have within the last quarter been more than once occupied with attempts to define what is meant by a cause of action, and have thus unconsciously perhaps been involved in the attempt to give a practical answer to the enquiries raised by Mill's chapter on the law of Causation.

Alderton v. *Archer*, 14 Q. B. D. 1, in effect raises the point whether the cause of action against a vendee under an agreement for the sale

of a lease depends upon the signature of the agreement by the purchaser, or also depends upon the signature of the counterpart agreement by the vendor. In the case in question the vendee signed a copy of the agreement in Middlesex, whereas the vendor signed the counterpart in the City of London. The latter signature was the only part of the whole transaction which took place in the City, and the vendor claimed a right to sue in the Mayor's Court on the ground that 'the cause of action' arose wholly or in part within the City of London. The Court held that the signature by the vendor was not part of the cause of action against the vendee, and that therefore no part of it arose within the City of London, and, as a consequence, that an action was not maintainable in the Mayor's Court. This decision was, we conceive, correct, but readers should note that the Judges were not called upon to decide whether the breach of a contract does or does not of itself constitute a cause of action. This should be noticed because cases such as *Vaughan* v. *Weldon*, L. R., 10 C. P. 47, or *Jackson* v. *Spittall*, L. R., 5 C. P. 542, suggest an idea that cause of action means part and not the whole of the facts giving rise to a right of action. This doctrine is logically and, we are inclined to believe, legally untenable.

The cases of *Mitchell* v. *Darley Main Colliery Co.*, 14 Q. B. D. 125, and *Brunsden* v. *Humphrey*, 14 Q. B. D. 141, decided by the Court of Appeal in July (why not sooner reported?), are both of great interest with regard to the principles of the same kind which underlie apparently technical questions, and which, since the abolition of the forms of pleading that disguised them in our old practice, have to be fully and boldly discussed. In the former case the Court carries out the principle that it is not in itself a wrong to do something on one's own land which may have the effect of letting down a neighbour's adjacent or superjacent land or buildings: not only a wrong and a cause of action arise only when a subsidence actually takes place (as was settled in *Backhouse* v. *Bonomi*, 9 H. L. C. 503), but every distinct subsidence is a new cause of action (overruling *Lamb* v. *Walker*, 3 Q. B. D. 389, in accordance with the dissenting judgment of Cockburn C.J.). This is quite in harmony with the doctrine of another class of cases not mentioned in the argument — those of which *Rylands* v. *Fletcher* (L. R., 3 H. L. 330) is the leading authority. It is not wrongful to keep water in an artificial reservoir, or fire in a traction engine, but if and when they escape and do damage (unless from certain excepted causes) the owner is liable; and every such event would undoubtedly be a fresh cause of action.

Brunsden v. *Humphrey* is a case (really of first impression, it would seem) of distinct injuries to the same party by one and the same wrongful act, for which, beyond question, damages might have been recovered in one action. The doubt was whether distinct actions would lie. Whether injury to the person is a generically different harm from damage to goods is an inquiry which goes rather behind

the ordinary grounds and reasons of the law; though, as Bowen L.J. pointed out, the historical distinction of the forms of action is capable of throwing much light upon it. We may add to the authorities collected in the Lord Justice's learned judgment one passage showing by the strongest evidence—that of a settled technical distinction—that the Roman lawyers thought the right of personal safety essentially different from the right to safe enjoyment of one's goods: 'Liber homo suo nomine utilem Aquiliae habet actionem: directam enim non habet, quoniam dominus membrorum suorum nemo videtur:' Ulpian in D. ix. 2. ad legem Aquiliam, 13 pr.

Lord Coleridge's view is put as well as it can be put in these words: 'That the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different rights, i. e. his person and his goods, I do not in the least deny. But it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but that he can bring two if besides his arm and his leg being injured his trousers which contain his leg... have been torn.' But this argument, though very telling, seems fallacious. A blow or a shot which hurts both a man's hands does double damage, but is only a single injury, i. e. it is the invasion of the one right not to have one's body injured; the breaking of a man's leg and the tearing of his trousers, or the breaking of his hand and the destruction of a diamond ring on his finger, is an interference with two rights, and there is no palpable absurdity in saying that interference with two rights must always give rise to two rights of action.

The Attorney-General of Duchy of Lancaster v. *Duke of Devonshire*, 14 Q. B. D. 195, determines a matter which appears to be of no great practical importance to any one but the Attorney-General for the Duchy. It is difficult to see that it greatly matters to an offender who may be the official in whose name an information is filed. But the case has considerable antiquarian interest, and illustrates the way in which in England legal and historical enquiries run into each other. It is certainly an odd thing that a case decided in 1884 should in any way turn upon the Year Book 22 Edward III, 3 *b*, or upon the position and rights of Sir Richard Empson, Attorney-General for the Duchy, under Edward the Fourth.

In *Hodkinson* v. *N. W. Ry. Co.*, 14 Q. B. D. 228, it has been held that a railway porter is not the Company's servant for the purpose of taking the temporary custody of luggage after it has been claimed by a passenger; not on the ground of any special term or condition in the Company's contract, but because the contract was fully performed by the delivering the luggage on the platform and the tender of the porter's services to put it on a cab. *Patscheider* v. *G. W. Ry. Co.*, 3 Ex. D. 153, is said by the Court to be clearly distinguishable, but the distinction is rather fine.

Weldon v. *De Bathe*, 14 Q. B. D. 339, decides that a married woman in sole occupation of a house bought by her own earnings since

the Married Women's Property Act, 1870, can bring an action of trespass alone without her husband against a wrongdoer who enters her house against her will, even though the entry is authorised by the husband. The decision is noteworthy in itself, but its main importance lies in the evidence which it affords of determination on the part of the judges to give full effect to the Married Women's Property Act. It is quite clear that henceforth a married woman will for all practical purposes have the same property rights as a feme sole. That this should be so is an outward sign of a revolution in public opinion as marked as any which has occurred within the last thirty years.

Reg. v. *Dudley* and *Stephens* (the 'Mignonette' case) is reported, 14 Q. B. D. 273. The argument for the defence appears to us capable of a somewhat more formal *reductio ad absurdum* than the Court thought it worth while to undertake.

It was not contended that the person killed under circumstances of so-called necessity would not be justified in resisting. Now, if resistance is justifiable at all, it is justifiable even to the infliction of death when one's own life is at stake. Therefore we should have a state of things in which A is not punishable for killing B, nor yet B for killing A if he cannot otherwise prevent A from killing him. But to say that A may kill B if he can, and also that B may kill A if he can, is to deny the existence of any law at all.

The note supplied by Grove J., 14 Q. B. D. at p. 288, is ingenious: 'If the two accused men were justified in killing Parker, then, if not rescued in time, two of the three survivors would be justified in killing the third, and of the two who remained the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving.' But is there not a touch of sophistry in it? If the possibility of justification is once admitted, every case must be separately considered with regard to the probabilities apparent to the actor at the time of the act done.

Brewer v. *Brown*, 28 Ch. D. 309, is a pretty plain case of a misleading statement in particulars of sale entitling the purchaser to rescind. As it was decided in the third week in November, one might think time had been taken to consider whether the case deserved a full report; but as the March issue of the Law Reports also contains cases decided as far back as June last, we suppose this is a mere accident.

Smith v. *Land and House Property Corporation*, C. A., 28 Ch. D. 7, is a less obvious and more interesting case of the same class.

Another unsuccessful attempt to escape the responsibility created by the Employers' Liability Act, 1880, is recorded in *Millward* v.

Midland Ry. Co., 14 Q. B. D. 68. We cannot blame the Company's advisers for taking the case to the superior court: when a statute is framed in such a manner as to invite litigation people cannot be expected to acquiesce without dispute in its application against themselves. But the Court's refusal of leave to appeal is not the less to be commended.

We have from a learned American contributor the following note of a case referred to at the end of the Editor's article in this number:—

Chicago, Milwaukee, &c. Ry. Co. v. *Ross*, 19 Reporter, 97, Supreme Court U. S., December Term, 1884.

The plaintiff was engineer of a freight train, which collided with a gravel train by reason of the failure of the conductor of the freight train to give him information of the coming of the gravel train. The conductor had the necessary information in time to deliver it (as it was his duty to do, by express regulation) to the plaintiff, and his failure so to deliver it was due to his own negligence. The plaintiff sustained damage by reason of this negligence. Held, that the defendant, common employer of the engineer and the conductor, was liable; four Judges dissenting. Field J., who delivered the lengthy opinion of the Court, thought that a conductor 'having the entire control and management of a railway train' could not be treated as a fellow-servant of an engineer on the same train; he *represented* the company. 'We agree with them [the Courts of Ohio and of Kentucky],' said he, 'in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible.'

The dissenting Judges (Matthews, Gray, Blatchford, and Bradley, JJ.), by Bradley J., said: 'We think that the conductor of the railroad train in this case was a fellow-servant of the railroad company with the other employees on the train.'

The following are the Ohio and Kentucky cases referred to: *Little Miami R. Co.* v. *Stevens*, 20 Ohio, 415; *Railroad Co.* v. *Keary*, 3 Ohio St. 201; *Louisville & N. R. Co.* v. *Collins*, 2 Duvall, 114.

[It will be observed that the American conductor has much larger powers than the British guard: but even so the decision of the Court is clearly in conflict with the English cases confirmed by *Wilson* v. *Merry*, L. R., 1 Sc. and D. 326. Our own opinion is that in *Wilson* v. *Merry* the House of Lords threw away a great opportunity of improving the law. At the moment of going to press we have seen a full report in the 'American Law Register' for February (vol. 24, p. 94; S. C. 13 Amer. Law Record, 513). It appears that the conductors of both trains were in fault. The

opinion delivered by Field J., while assuming the doctrine that a servant takes upon himself all ordinary risks to be a settled part of the Common Law, doubts its policy.]

In *Commonwealth* v. *Pierce* (Supreme Court, Massachusetts; 24 Amer. Law Register, 117), a case of manslaughter by unskilful medical treatment, O. W. Holmes J. has given a judicial exposition of the doctrine of the 'external standard' of a prudent man's conduct already familiar to readers of his lectures on the Common Law. He cites *Vaughan* v. *Menlove*, 3 Bing. N. C. 468, an important case too little noticed by the text-books, where the contention that a man is bound only to act to the best of his own judgment, such as that may be, was decisively rejected by the Court of Common Pleas.

CONTENTS OF EXCHANGES.

(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

The Canadian Law Times. Ed. by E. DOUGLAS ARMOUR. Vol. V, No. 1, Jan. 1885. Toronto: Carswell & Co.

Powers of Sale in Mortgages—To the Memory of James Bethune, Q.C.—Editorial Notes, Reviews, etc.

The American Law Register. N.S., Vol. 24, No. 2, Feb. 1885. Philadelphia: Canfield & Co.

Reformation in Equity of Contracts void under Statute of Frauds, by H. Campbell Black—Reports with Notes, Abstracts of Decisions.

The American Law Record. Vol. 13, No. 9, March, 1885. Cincinnati: Block Publishing Co.

Reports in Supreme Courts, U. S. and States—Current Items—Digest—Book notices.

Bulletin de la Société de Législation Comparée. (Paris), 16me Année. No. 1, Jan. 1885; No. 2, Feb. 1885.

No. 1. Reports and Transactions—Danish and Norwegian Bankruptcy Law, L. Beauchet—Elections in United States, R. Millet—Belgian and French legislation—Reviews.

No. 2. Religious elements in American law (Cantel)—Proportional representation in Scandinavian lands (P. Dareste)—Legislation in Spain and Portugal—Reviews.

Revue de Droit International et de Législation Comparée. Vol. 17, No. 1. Brussels and Leipsic, 1885.

Civilisés et barbares, J. Hornung—Des hostilités sans déclaration de guerre, Féraud-Giraud—Le désarmement proportionnel, J. Lorimer—Du conflit des lois en matière d'obligation alimentaire, L. Olivi—etc.: literary notes, reports, reviews, etc. Vol. 16 (for 1884) is announced as complete.

Zeitschrift für das Privat—und Oeffentliche Recht der Gegenwart. Vol. 12, Part 2. Vienna, 1885.

Verbrauch der Strafklage nach deutschem Strafprocessrecht (Julius Glaser)—*Emptio rei speratae* u. *Emptio spei* (Fr. Endemann)—Löschung von Hypotheken nach österr. Recht (H. Krasnopolski)—and many book reviews.

Centralblatt für Rechtswissenschaft. Vol. 4, Part 3, Dec. 1884. Stuttgart.

This journal is wholly devoted to reviews and bibliography. Among the books noticed the following are of specially English interest: V. Mayer, Thomas Hobbes, Darstellung u. Kritik, &c., Freiburg 1884, described as 'klar und verständlich, fast populär gehalten'; J. C. Reed, American Law Studies, Boston, 1882, 'nach allen Richtungen eine interessante Erscheinung'; M. Lush, Law of Husband and Wife.

Archivio Giuridico. Vol. 34, No. 1. Pisa, 1885.

Tango—Contabilità di Stato: Cantarelli—The date of the Lex Iunia Norbana: Rinaldi—On certain questions of preference between creditors: Lordi—Questions under art. 819 of the Civil Code: Buonamici—Letter on a new, apparently very bad, edition of the Institutes—Reviews.

Rassegna di Diritto Commerciale Italiano e Straniero. Vol. 2, No. 5, Jan. 1885. Turin.

Dove Wilson—Codification of British Commercial Law: E. Adan—The contract of life assurance: Santoni de Sio—La Cambiale in fiera (posthumous): Salvatore Sacerdote—Should brokers need a licence? Book notices—Reports of cases—Translation of English Bankruptcy Act, 1883, concluded.

Il Filangieri: Rivista Giuridica Italiana di Scienza, Legislazione e Giurisprudenza. Part 1, Jan. 1885. Naples.

Celestino Summonte—Reform of local Government: Manara—Special conditions in contracts of carriage: Napodano—Draft Penal Code: Vivante—Agents of insurance companies: Reviews. The Editor (Prof. Alberto Marghieri) announces that in future numbers reports will appear of cases decided in all the superior Courts of Italy.

The Contents of Number III of the LAW QUARTERLY REVIEW (to be published on July 1) will probably include:—

Some Results of the Judicature Acts. By Lord Justice BOWEN.
The Position of the Legal Profession. By E. S. ROSCOE.
Agreement in Contract. By Prof. T. E. HOLLAND.
The Law of Insurance. By A. COHEN, Q.C., M.P.
The Seisin of Chattels. By F. W. MAITLAND.
A Difficulty in the Doctrine of Consideration. By Dr. E. GRUEBER.
Mistake of Law as a Ground of Equitable Relief. By MELVILLE M. BIGELOW.
Justice in Egypt. By HAROLD A. PERRY.
Digest of Cases. By EDWARD MANSON.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

DIGEST OF CASES

REPORTED IN

THE LAW REPORTS, THE LAW JOURNAL, THE WEEKLY REPORTER, AND *THE LAW TIMES,*

FROM

DECEMBER 1884 TO MARCH 1885.

By EDWARD MANSON,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

ADULTERATION.—*Sale of Food and Drugs Act—'Milk'—Skimmed Milk.*—A milk-seller sold as 'milk' milk which had been skimmed and thereby lost 60 per cent. of the butter fat which it would have had in its natural state: Held, not an offence under sect. 6 of the Food and Drugs Act, 1875. (Dec. 15, 1884.) *Lane* v. *Collins*, 14 Q. B. D. 193.

ARBITRATION.—*Award—Time for making—Enlargement—Agreement—Jurisdiction.*—An award was made after the time fixed by the submission for making it had expired: Held, in an action upon the award, that the Court had power under sect. 15 of the Common Law Procedure Act to enlarge the time for making the award. (August 12, 1884.) *May* v. *Harcourt*, 13 Q. B. D. 688.

ARTIZANS' DWELLINGS ACT.—*Taking Land—Award—Appeal—Interest—Taking Possession.*—A Corporation paid into Court the price as assessed by arbitration of land taken under the Artizans' Dwellings Act, and being satisfied with the title entered into possession. The owner appealed to a jury and was awarded a larger sum: Held, that he was entitled to interest at 4 per cent. on the larger sum from the date of the Corporation entering into possession. (Chitty J., July 22, 1884.) *Re Shaw and the Birmingham Corporation*, 27 Ch. D. 614; 33 W. R. 74; 54 L. J., Ch. 51.

ATTACHMENT OF DEBTS.—*Judgment Debt—Attachment after six years—Statute of Limitations.*—A creditor of a judgment creditor more than six years after the date of the judgment obtained a garnishee order attaching the debt: Held, that his rights against the garnishee debtor were not barred by the Statute of Limitations. (Dec. 16, 1884.) *Fellows* v. *Thornton*, 33 W. R. 258.

BANKER.—*Liability—Crossed Cheques—Unauthorised signature per proc.—Inquiry—Negligence—Bills of Exchange Act*, 1882.—An agent fraudulently paid into a bank of which he was a customer crossed cheques received by him for his principal, indorsing them per proc. without authority. The bank collected the cheques and the agent absconded with the proceeds. The bank made no inquiry as to the customer's authority to sign per proc.: Held, that having been guilty of negligence they were not protected by sect. 82 of the Bills of Exchange Act, 1882. Cheques do not become 'crossed cheques' within sect. 82 by being crossed by a banker for collection. (Nov. 15, 1884.) *Bissell* v. *Fox*, 51 L. T. R. 663.

BANKRUPTCY.—*Act of Bankruptcy—Assignment for benefit of Creditors—Receiving Order—Liability of Trustee of Deed as trespasser.*—*R.*, a trader, executed an assignment for the benefit of his creditors generally. *V.* was appointed trustee of the deed and carried on the debtor's business under it. A receiving order was afterwards made on the petition of non-assenting creditors against *R.*, founded on the assignment as an act of bankruptcy: Held, that the official receiver under the bankruptcy was entitled at his option to treat *V.* as a trespasser or as his agent: and the receiver electing

BANKRUPTCY—(continued).

to treat him as a trespasser an account was directed of the value of the bankrupt's property received by *V.* Conf. *Re Richards*, 32 W. R. 1001. *Re Riddeough, Ex parte Vaughan*, 14 Q. B. D. 25; 33 W. R. 151.

Act of Bankruptcy—Payment to Creditor's Agent pending Petition—Relation back of Trustee's Title—Liability of Agent.—The solicitor of a petitioning creditor pending the hearing of the petition received from the debtor various sums on account in consideration of successive adjournments of the hearing of the petition, and paid over the sums so received to his principal. An adjudication was afterwards made on the petition: Held, that the solicitor having received the money with notice of an act of bankruptcy to which the trustee's title related back, was personally liable to repay the amount to the trustee in bankruptcy. (C. A., Aug. 4, 1884.) *Re Chapman, Ex parte Edwards*, 13 Q. B. D. 747.

Costs—Shorthand Notes of Evidence— Appointment obtained by one Party—Application to allow after Hearing.—A trustee in bankruptcy who was respondent to an appeal obtained the appointment of a shorthand writer under Bankruptcy Rules, 1870, R. 207, to take notes of the evidence. The appeal was dismissed with costs, but no application was made at the time to allow the shorthand notes: Held, on a subsequent application, that the appointment having been obtained at the instance of one party only, he could not, though successful, be allowed the costs in the absence of special circumstances; secus had the appointment been by both parties: Held, also, that the trustee ought to have made the application at the hearing, and must pay the costs of the subsequent application. (Nov. 18, 1884.) *Re Day, Ex parte Speed*, 33 W. R. 80.

County Court Judge—Jurisdiction to Commit—Order to attend as Witness—Non-compliance.—Section 66 of the Bankruptcy Act, 1869 (Bankruptcy Act, 1883, sect. 100), gives to a County Court Judge sitting in bankruptcy power to commit a person who has been ordered to attend as a witness under sect. 96 (Bankruptcy Act, 1883, sect. 27), and has not complied with the order. (C. A., May 30, 1884.) *Reg.* v. *Judge of Croydon County Court*, 53 L. J., Q. B. 545; 32 W. R. 68; 51 L. T. R. 102.

Discharge—Certificate of Conformity—Suspension—Bankruptcy Act, 1849—*After-acquired Property—Chief Clerk's Certificate—Summons to Vary.*—Where the Court had in 1848 adjudged that the grant of a bankrupt's certificate of conformity be suspended for three years: Held, that by sect. 199 of the Bankruptcy Act, 1849, the order operated on the expiration of the period of suspension as a complete discharge to the bankrupt, and that property acquired by him after that date belonged to him and not to his official assignee. An extension of time for applying to vary the Chief Clerk's certificate granted at the hearing on further consideration on the applicant undertaking to take out a summons *pro forma*. (Pearson J., July 29, 1884.) *Re Dove, Bousfield* v. *Dove*, 27 Ch. D. 687; 53 L. J., Ch. 1099; 33 W. R. 197.

Disclaimer—Agreement for Lease—Assignment—Continuing liability—'Land burthened with onerous covenants'—'Property.'—*M.*, being in possession of premises under an agreement for a twenty-one years' lease, assigned his interest and gave up possession to a company, remaining however liable to the lessors under the agreement. A receiving order was afterwards made against *M.*, and his trustee applied for leave to disclaim the property as 'land burthened with onerous covenants' within the Bankruptcy Act, 1884, sect. 55, sub-sect. 1: Held, that he must have leave to do so: property in this sub-sect. not being confined to the property divisible among the bankruptcy creditors in sect. 44. (Jan. 19, 1885.) *Re Maughan, Ex parte Monkhouse*, 54 L. J., Q. B. 128; 33 W. R. 308.

Disclaimer of Lease—Leave—Fixtures—Trustee's right to.—Where a trustee applied for leave to disclaim leasehold property of the bankrupt and there were fixtures on the premises, the Court gave the trustee leave to disclaim with liberty to remove the fixtures upon paying the rent due, or, at the option of the landlord, to surrender the fixtures as an equivalent for the rent. (Aug. 13, 1884.) *Re Moser, Ex parte Painter*, 13 Q. B. D. 738; 33 W. R. 16.

Disclaimer of Lease—Lease—Terms—Indemnity to retired Partner.—*T.*, a retiring

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partner, covenanted to stand seised of his interest in a lease granted to himself and *S.* his co-partner, upon trust for *S.*, who was continuing the business. *S.* became bankrupt, and *T.* had to pay the rent to the landlord during the trustee's occupation: Held, on an application by *S.*'s trustee for leave to disclaim, that as a condition of doing so the trustee must repay to *T.* what *T.* had paid to the landlord. (C. A., July 11, 1884.) *Re Salkeld, Ex parte Good*, 13 Q. B. D. 731; 32 W. R. 22.

Disclaimer of Lease—Leave—Terms—Vesting Order.—Where mortgagees of a lease had deposited it with their bankers C. & Co. to secure an advance and were afterwards adjudicated bankrupts, the Court in granting leave to the trustee to disclaim put C. & Co. to their election to take a vesting order within fourteen days or to be excluded from all interest in the property. (Nov. 24, 1884.) *Re Parker & Parker, Ex parte Turquand*, 51 L. T. R. 667.

Disclaimer of Tenancy—Liability of Trustee—Use and occupation—Terms.—The trustee of a bankrupt on Oct. 10, 1883, entered into possession of premises occupied by the bankrupt as tenant from year to year, and remained in possession till Jan. 28, 1884, paying rent down to Dec. 25. On Feb. 24, 1884, the trustee obtained leave to disclaim: Held, on a claim for rent from Dec. 25, 1883, to Jan. 28, 1884, that the trustee's personal liability was extinguished by the disclaimer, and that the landlord's proper course was to have applied to have the trustee put on terms in disclaiming. (June 30, 1884.) *Gabriel* v. *Blenkenstein*, 13 Q. B. D. 684; 33 W. R. 151.

Official Receiver—Powers of—Sale of Debtor's property.—An official receiver in bankruptcy in his capacity of receiver and manager has, under sect. 70 of the Bankruptcy Act, 1883, only the same powers as a receiver or manager appointed by the High Court. He cannot, except where acting as trustee, sell or dispose of the property of the debtor other than perishable goods. Quære, whether an order of the Board of Trade would justify a sale by him? (Dec. 16, 1884.) *Re Parkers, Ex parte Turquand*, 33 W. R. 262.

Petition—Judgment Debt—Appeal pending by Debtor—Adjournment of Petition—Discretion of Registrar.—Where a judgment creditor has presented a bankruptcy petition founded on non-compliance by the debtor with a bankruptcy notice, and the Registrar has in the exercise of his discretion under the Bankruptcy Act, 1883, sect. 7, subsect. 4, adjourned or dismissed the petition pending an appeal by the debtor from the judgment, the Court of Appeal will not overrule the registrar's discretion unless the exercise of it has been clearly wrong. If the appeal is plainly a frivolous one, the registrar should make a receiving order; secus if it appears bona fide. (C. A., Nov. 21, 1884.) *Re Rhodes, Ex parte Heyworth*, 14 Q. B. D. 49.

Petition—Presentation in wrong Court—Receiving Order—Jurisdiction to make.—Where a bankruptcy petition had inadvertently been presented in a wrong Bankruptcy Court and on that ground dismissed, the Divisional Court holding that it had jurisdiction under sects. 95, 97 of the Bankruptcy Act, 1883, to do so, made the receiving order which the County Court ought to have made. (Nov. 12, 1884.) *Re Wrightmore, Ex parte May*, 14 Q. B. D. 37.

Petition—Signature by Attorney.—An attorney may sign a bankruptcy petition under Rule 125 of the Bankruptcy Rules, 1883, on behalf of a creditor, if the terms of the power of attorney given him by the creditor authorise him to do so. (C. A., Oct. 31, 1884.) *Re Wallace, Ex parte Richards*, 14 Q. B. D. 22; 33 W. R. 66; 51 L. T. R. 551.

Petition by Trustee of Debt—Joining beneficial Owner—Act of Bankruptcy—Availability to any Creditor—Amendment.—The rule still obtains under the Bankruptcy Act, 1883, that where a person to whom a debt is due is trustee of it for an absolute beneficial owner, he cannot present a bankruptcy petition against the debtor without joining his cestui que trust as co-petitioner. Where an act of bankruptcy has been committed by non-compliance with a bankruptcy notice any creditor may present a petition founded upon it. Amendment of petition allowed. (C. A., Dec. 5, 1884.) *Re Hastings, Ex parte Dearle*, 14 Q. B. D. 184.

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Preferential Debt—Gas Co.—'Rent'—Right to Distrain.—Where a Corporation by its special Act had power to 'recover from any person any rent or charge due to them by him for gas supplied by the like means as landlords are for the time being by law allowed to recover rent in arrear:' Held, that a distress for gas supplied levied by the Corporation on a customer who had filed a liquidation petition was lawful though the payment for gas was not properly 'rent,' or the Corporation within the words 'other person to whom any rent is due,' in sect. 34 of the Bankruptcy Act, 1869. (C. A., August 12, 1884.) *Re Peake, Ex parte Harrison*, 13 Q. B. D. 753; 53 L. J., Ch. 977.

Proof—Judgment after Act of Bankruptcy—Notice—Onus of Proving.—B. obtained judgment (the judgment being the only evidence of the debt) against *T.* after *T.* had committed an act of bankruptcy in 1842, but did not attempt to prove until 1883, when large assets became available: Held, that under sect. 165 of the Bankruptcy Act, 1849, that the onus was on *B.* of showing that when he obtained judgment he had no notice of the act of bankruptcy, and that not having discharged that onus he could not prove for the amount. (C. A., July 4, 1884.) *Ex parte Revell, Re Tollemache* (No. 2), 54 L. J., Q. B. 92; 51 L. T. R. 379.

Proof—Judgment in 1842—Inquiry into consideration—Admission by Bankrupt.—A creditor obtained judgment in 1842 against his debtor, but made no attempt at the time to prove in the bankruptcy of the debtor: Held, on a claim by the judgment creditor to prove in 1883, that the Court could and ought to go behind the judgment and inquire into the consideration for it.

A statement of a debt by a bankrupt in his statement of affairs, though verified by oath, is not such an admission against the interest of the debtor as to be evidence of the debt against the creditors after his death. (C. A., June 20, 1884.) *Re Tollemache, Ex parte Revell* (No. 1), 13 Q. B. D. 720; 54 L. J., Q. B. 89; 51 L. T. R. 376.

Property of Bankrupt—Appropriation of 'Salary or Income'—Professional earnings.—Professional earnings in futuro of a bankrupt bone-setter held not to be 'salary or income' attachable by the trustee under the Bankruptcy Act, 1883, sect. 53, sub-sect. 2. (C. A., Dec. 12, 1884.) *Re Hutton, Ex parte Benwell*, 33 W. R. 242.

Relation back of Trustee's Title—Payment out of assets to stifle prosecution—Recovery from Payee.—After *C.* had filed a liquidation petition, *C.*'s bankers commenced a prosecution against him for obtaining credit by false pretences: but withdrew it on *C.*'s uncle undertaking to pay the amount obtained by false pretences. The uncle paid the money, but out of *C.*'s moneys, though not to the knowledge of the bank: Held, that the bargain being to stifle a prosecution was a corrupt one and without consideration, and though not impeachable by the uncle was impeachable by the trustee in *C.*'s liquidation, who was entitled by virtue of the relation back of his title to recover the money from the bank. (Nov. 12, 1884.) *Re Campbell, Ex parte Wolverhampton and Staffordshire Banking Co.*, 14 Q. B. D. 32.

Secured Creditor—Valuation of Security—Amendment—Notice of Appeal—Posting—Trustee—Costs of Appearance.—The right of a secured creditor under the Bankruptcy Act, 1883, sched. 2. r. 13, to amend his valuation on showing to the satisfaction of the Court that it was made on a mistaken estimate is not taken away by the existence of a subsequent mortgage. Quære, whether notice of a bankruptcy appeal is sufficient if posted though not received within twenty-one days? A trustee in bankruptcy though served with notice of an appeal ought not to appear merely to ask for his costs. (Dec. 4, 1884.) *Re Arden, Ex parte Arden*, 14 Q. B. D. 121.

Trustee—Removal of one of several Trustees—Jurisdiction—'Cause shown'—Discretion of Registrar.—Where there are two or more trustees under a bankruptcy, the Court has jurisdiction upon 'cause shown' under sect. 83 of the Bankruptcy Act, 1883, to remove one of two such trustees without removing the other. The 'cause shown' need not be fraud or dishonesty. Though the removal of a trustee by the registrar is not a pure exercise of discretion, the Court of Appeal will not readily overrule his decision. (C. A., Nov. 28, 1884.) *Re Mansel, Ex parte Newitt*, 14 Q. B. D. 117; 33 W. R. 142.

BILL OF EXCHANGE.—*Bills drawn against Shipments—Specific Appropriation—Bankruptcy of Acceptors—Lien—Goods in Specie.*—Bankers authorised *S.* to draw on them to the amount of 20,000*l.* against consignments of tea shipped by him, the drafts to be accompanied by the bills of lading, which were to be surrendered to the bankers against their acceptances: Held, on the bankers going into liquidation, that the holders of bills drawn by *S.* under the credit, and which had matured after the liquidation, could not claim any specific appropriation of teas consigned by *S.* to the bank to meet the acceptances, but held that *S.* was entitled to have the teas remaining in specie at the date of the liquidation (but not the proceeds of teas sold before that date) applied in payment of the acceptances. (C. A., August 4, 1884.) *Re Sase, Ex parte Dever*, 13 Q. B. D. 766; 51 L. T. R. 437.

Assignment of future Stock in Trade—Pledge by Grantor—Right of Grantee—Equitable Title—Legal Title.—By a registered bill of sale made in 1881, *M.* assigned all his then stock in trade and also all stock in trade which should be brought on the premises during the continuance of the security to *J.*; *M.* afterwards pledged with a pawnbroker who had no notice of the bill of sale jewellery which had been brought on the premises after the date of the bill of sale: Held, in an action for detinue by *J.* against the pawnbroker, that *J.* had only an equitable title which must yield to the pawnbroker's legal title. (C. A., Oct. 31, 1884.) *Joseph* v. *Lyons*, 54 L. J., Q. B. 1; 33 W. R. 145; 51 L. T. R. 740.

Consideration—Statement of—Provision as to Bankruptcy of Grantor—Statutory Form.—A bill of sale given in substitution for another bill believed to be invalid under the Bills of Sale Acts, though not expressed to be so, stated the consideration to be '1500*l.* now paid,' this being the consideration given for the first bill. Held, that the consideration was truly stated. A provision in a bill of sale for seizure, if the grantor 'shall do or suffer any matter or thing whereby he shall become a bankrupt,' is not such a departure from the words 'if he shall become a bankrupt' in the statutory form as to invalidate the bill. (Nov. 12, 1884.) *Re Munday, Ex parte Allan*, 14 Q. B. D. 43; 33 W. R. 231.

Pledge of Delivery Warrants—Non-registration—Bankruptcy of Pledgor—Bills of Sale Act Amendment Act.—A trader pledged with his bankers to secure an advance delivery warrants for goods consigned to him: Held, on his subsequent bankruptcy, that the object of the transactions being immediately to transfer the possession from the grantor to the grantee, the pledge was not a bill of sale within the Bills of Sale Acts, 1878-1882, so as to be void for informality or for want of registration. (Dec. 3, 1884.) *Re Hall, Ex parte Close*, 54 L. J., Q. B. 43; 33 W. R. 228; 51 L. T. R. 795.

Statutory Form—Departure from—Payment 'on Demand'—Suggestio Falsi.—By a bill of sale the grantor agreed that he would, 'upon demand made in writing,' pay the principal sum and interest: Held, that the bill was void, not being an agreement for payment at a fixed or stipulated time in accordance with the statutory form in the schedule to the Bill of Sale Amendment Act, 1882. Held *per* Brett M.R., and Fry L.J., that the bill was also void on the ground that it purported to give the grantor a power to sell immediately on seizure. (C. A., July 31, 1884.) *Hetherington* v. *Groom*, 13 Q. B. D. 789; 53 L. J. 576; 51 L. T. R. 412.

BUILDING SOCIETY.—*Accounts—Reopening—Settled Account—Single Auditor.*—In an action for an account against the secretary of a Building Society the Court of Appeal declared that all accounts audited in accordance with a rule of the Society should be prima facie evidence in favour of the defendant; the rule spoke of 'auditors:' Held, that they must be taken to be auditors required by 10 Geo. IV. c. 56. s. 33. and that accounts audited by a single person, and that person not a member of the society, were not settled accounts under the rule, though the defendant might show them to be so on any other ground. (C. A., Nov. 14, 1884.) *Holgate* v. *Shatt* (No. 2), 28 Ch. D. 111.

Fines in Arrear—Adding to Principal—Compound Interest—Rules—Reasonableness.—A rule of a building society provided that advanced members 'neglecting to make their monthly payments of principal, interest, fines, and other payments should

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be liable to a fine at the rate of 5*l.* per cent. per month on the total amount in arrear:' 'Held, that neither the rule nor the amount of the fine was unreasonable.—(Kay J., Nov. 8, 1884.) *Re Middlesborough Building Society*, 51 L. T. R. 743.

Mortgage—Statutory Receipt—Effect of—Transferee of Mortgage.—The transferee of a mortgage made to a building society took from the society on the transfer the statutory receipt indorsed on the mortgage under 37 & 38 Vict. c. 42. s. 42: Held, that the effect of the receipt was to vest the legal estate in the transferee and give him priority for the amount of the advance over a prior purchaser without notice of the equity of redemption. (Kay J., Dec. 18, 1884.) *Sangster* v. *Cochrane*, 54 L. J., Ch. 301; 33 W. R. 221; 51 L. T. R. 889.

Winding-up—Unauthorised Borrowing—Necessary Payments.—A building society not empowered to borrow overdrew its account at its bankers in order to pay advanced members: Held, in the winding-up of the Society, that the bankers were not creditors of the society in respect of the overdrafts, such overdrafts being indistinguishable from loans by the bankers. The nature of a building society's business does not give the society an implied power of borrowing. (C. A., No. 888, 5th S., *affirmed* H. L., Aug. 1, 1884.) *Brooks & Co.* v. *The Blackburn and District Benefit Building Society*, 9 App. Cas. 857.

CARRIER.—*Railway Company—Passenger—Delay—Ticket incorporating Handbills—Wilful Misconduct.*—A passenger by railway who had taken a through ticket via *H.* to *B.* owing to the train being late in arriving at *H.* missed his train to *B.*, which was timed to meet it, and was detained more than four hours. The ticket had on it the words 'See back' conspicuously printed, and on the back the words 'Issued subject to the conditions stated in the company's time bills.' By the conditions the company was not to be liable, inter alia, for delay unless caused by wilful misconduct: Held, in an action by the passenger for damages, that the conditions were incorporated into the contract, and no wilful misconduct having been proved the action must be dismissed. (Dec. 5, 1884.) *Woodgate* v. *Great Western Railway Company*, 51 L. T. R. 826.

Railway Company—Tolls—Preferential Rate—Railway Clauses Act—Railway and Canal Traffic Act—Action for Breach of.—Sect. 90 of the Railway Clauses Act, 1845, providing that the tolls for the same classes of goods passing only over the same portion of line and under the like circumstances must be equal, means passing between the same points of departure and arrival. No action will lie for an infringement of s. 2 of the Railway and Canal Traffic Act. (C. A., Dec. 1, 1884.) *Manchester, Sheffield, and Lincolnshire Railway Company* v. *The Denaby Main Colliery Company*, 14 Q. B. D. 209; 54 L. J., Q. B. 103.

CHARITY.—*Charity Commissioners—Powers—Endowed Schools Act—Denominational School.*—The Charity Commissioners by a scheme directed that the endowment of a particular school should no longer be applied in carrying it on, but in providing exhibitions for the benefit of a larger area of schools: Held, that such a conversion was within their power under s. 9 of the Endowed Schools Act, 1869: 'Denominational School' considered. (P. C., March 25, 1884.) *Re Parochial Schools of St. Leonard's, Shoreditch*, 51 L. T. R. 305.

CHOSE IN ACTION.—*Absolute assignment—Landlord directing tenant to pay rent to third party.*—*B.* on borrowing money from *R.* gave *R.* a letter to a tenant of *B.*'s to pay over the rent as it became due to *R.* on *R.*'s receipt: Held an absolute assignment within sect. 25. subs. 6 of the Judicature Act entitling *B.* to sue the tenant. (Dec. 6, 1884.) *Knill* v. *Prowse*, 33 W. R. 163.

CHURCH BUILDING ACTS.—*Devise of land with Church—Secret trust—Mortmain Act.*—*B.* devised land of less than five acres with a licensed chapel upon it to his wife upon a secret trust to convey it as a church or chapel for worship according to the rules of the Church of England in perpetuity: Held, that the devise was a valid one within the Church Building Act, 1803. (V.C. B., Dec. 17, 1884.) *O'Brien* v. *Tyssen*, 54 L. J., Ch. 284; 51 L. T. R. 814.

COLONIAL LAW.—*Canada — Quebec — Barrister — Fees — Right to recover — Quantum meruit—Petition of Right Act*, 1876.—A member of the Quebec Bar held entitled to a quantum meruit for professional services rendered by him to the Government: Held also, that his right was not affected by the Petition of Right Canada Act, sect. 19 (3), that Act restricting the 'remedy' only (as distinguished from the right) against the Crown to cases in which the remedy would be available in England. (P. C., July 12, 1884.) *Reg.* v. *Doutre*, 9 App. Cas. 745; 53 L. J., P. C. 85.

Jersey—Set-off—'Liquid' demand.—A set-off of a 'liquid' demand is permitted by the law of Jersey. (P. C., June 13, 1884.) *Dyson* v. *Godfray*, 9 App. Cas. 726; 53 L. J., P. C. 94; 51 L. T. R. 580.

Natal—Surety—Bond by woman's attorney—Validity—Non-renunciation of legal protection.—Wife held not bound as surety under a mortage bond executed by her husband as her attorney, the power of attorney not showing any authority to him to renounce on her behalf the protection given to a woman under the Senatus Consultum Velleianum, and other rules of Natal law. (P. C., June 25, 1884.) *Mackellar* v. *Bond*, 9 App. Cas. 715; 53 L. J., P. C. 97; 51 L. T. R. 479.

New South Wales—Tramways—Use of steam.—Sect. 3 of the New South Wales Act, 43 Vict. No. 25, sanctions the use of steam motors on tramways. (P. C., July 12, 1884.) *Commissioner for Railways* v. *Tookey*, 9 App. Cas. 720; 53 L. J., P. C. 91; 51 L. T. R. 582.

New Zealand—Public Works Act, 1882—*Compensation—Irrevocable licence—'Estate or interest in land.'*—The Government of New Zealand permitted *P.* to erect and use a jetty on land vested in the Crown. *P.* afterwards, at the request and for the benefit of the Government, incurred large expenditure in the extension of the jetty: Held, that the licence was thereby rendered irrevocable, and that on the jetty being taken under the Public Works Act, 1882, *P.* was entitled to compensation for it as an 'estate or interest to, in, or out of land,' within sect. 4 of that Act. (P. C., June 25, 1884.) *Plimmer* v. *Mayor of Wellington*, 9 App. Cas. 699; 53 L. J., P. C. 105; 51 L. T. R. 475.

Victoria—Executor—Purchase of testator's estate—Validity—Renunciation.—*D.*, an executor who had never proved the will or acted in any way under it, purchased the estate from his co-executor and afterwards renounced: Held, that the purchase could not be set aside in the absence of evidence to show that in making it *D.* had taken an unfair advantage of his position. (P. C., July 12, 1884.) *Clark* v. *Clark*, 9 App. Cas. 733; 53 L. J., P. C. 99.

COMPANY.—*Costs—Priorities—Receiver in Debenture Holders' Action—Remuneration—Realisation of Assets.*—In an action by debenture holders of a mining company to realise their security a receiver and manager was appointed, who carried on the workings until a winding-up order was made: Held, in the winding-up, that the order of priorities as to costs etc. was as follows: (1) the costs of realisation of the assets; (2) costs and remuneration of receiver; (3) costs and expenses of trustees of the debenture deed; (4) costs of the plaintiffs in the action; (5) the amounts due to debenture holders. (Pearson, J., Nov. 25, 1884) *Batten* v. *Wedgwood Coal and Iron Company*, 33 W. R. 303.

Directors—Qualification Shares—Acceptance of from Promoter—Joint and Several Liability—Set-off.—Directors of a company accepted from a promoter of the company as their qualification shares, fully paid-up shares which the promoter had received as a premium for his promotion services from the company: Held, that they were jointly and severally liable to pay the full value of the shares: Held also, that one of the directors who had made advances to the company was not entitled to set-off such advances against the amount due on the shares. (Pearson, J., June 19, 1884.) *Re Carriage Co-operative Supply Association*, 27 Ch. D. 322; 53 L. J., Ch. 454; 51 L. T. R. 286.

Memorandum of Association—Alteration—Ultra Vires—Ratification.—The memorandum of association of a company incorporated under the Companies Act, 1862, provided for the payment of dividends in certain proportions between preference and ordinary

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shareholders: Held, that though this was one of the things not necessary to be stated in the memorandum, yet being stated and forming part of the constitution of the company a special resolution varying the provision was ultra vires and incapable of ratification. Sizable receipt of dividends under the altered scheme might estop the shareholder receiving them from claiming more, but could not bind subsequent transferees. (Kay J., Oct. 31, 1884.) *Ashbury* v. *Walton*, 28 Ch. D. 56; 54 L. J., Ch. 12; 51 L. T. R. 766.

Petition for Winding-up—'Creditor'—Debenture Holder—Existence of Assets—Provisional Liquidator.—A company issued debentures by which it agreed to pay the amount thereby secured to the bearer. The company also assigned property to trustees for the benefit of the debenture holders, and covenanted with the trustees for payment of the principal and interest: Held, that a holder of one of the debentures on which the interest was unpaid was a creditor of the company, and entitled to present a winding-up petition, and that there was not sufficient evidence of the property comprised in the trust deed being the only assets of the company to prevent a winding-up order being made. (Pearson J., May 10, 1884.) *Re Olathe Silver Mining Company*, 27 Ch. D. 278; 33 W. R. 12.

Petition for Winding-up—Withdrawal—Costs of Supporting Shareholders.—Where a creditor who has presented a winding-up petition desires at the hearing to withdraw it, he must pay the costs of shareholders who have appeared to support the petition, unless they consent to the withdrawal. (Chitty J., Nov. 1, 1884.) *Re Nucapai Gold Mining Company*, 28 Ch. D. 65; 54 L. J., Ch. 109; 33 W. R. 117; 51 L. T. R. 900.

Petition for Winding-up not advertised—Withdrawal—Contributories—Costs of Appearance.—Leave given to withdraw an unadvertised petition for a winding-up order without payment of the costs of shareholders appearing to oppose, though the petition had appeared several times in the paper. (Pearson J., Dec. 17, 1884.) *Re United Stock Exchange. Ex parte Phelps & Kidd*, 28 Ch. D. 183; 54 L. J., Ch. 310.

Reduction of Capital—Pending Petition—'And Reduced'—Dispensing with.—Pending the hearing of a petition about to be presented to obtain the sanction of the Court to a resolution for the reduction of capital, the Court gave the company permission to dispense with the words 'and reduced.' (V.C. B., Jan. 27, 1885.) *The River Plate Fresh Meat Company*, 33 W. R. 319.

Unregistered Society—Loan by—Registration—Bankruptcy of Borrower—Right to prove.—A money-lending society consisting of more than twenty persons associated for gain but unregistered lent 100*l.* to *T.*, a member, to be repaid by instalments. The society was afterwards registered, *T.* continuing to pay his instalments until his bankruptcy: Held, that a new contract must be implied not to take advantage of the legal infirmity, and that the society might prove for the balance of the debt in *B.*'s bankruptcy. The business of such a society being carried on by agents as distinguished from trustees fewer in number than twenty does not render it less illegal. (Nov. 10, 1884.) *Re Thomas, Ex parte Poppleton*, 51 L. T. R. 602.

Winding-up—Contributory—Payment by, without 'Call'—Enforcing.—The Court has power under s. 102 of the Companies Act, 1862, in the winding-up of a company to order a contributory to pay a sum of money which the official liquidator swears is necessary in the winding-up though no formal 'call' has been made either by the directors or the liquidator. (V.C. B., Nov. 27, 1884.) *Re Norwich Equitable Fire Assurance Company, Miller's Case*, 54 L. J., Ch. 141; 33 W. R. 271; 51 L. T. R. 619.

Winding-up—Examination of Director—Pending Action.—An officer of a company that is being wound up cannot refuse to be examined under s. 115 of the Companies Act, 1862, because an action by the liquidator is pending against him. (Kay J., Nov. 13, 1884.) *Re The Metropolitan (Brush) Electric Light and Power Company, Ex parte Leaver*, 51 L. T. R. 817.

Winding-up—Inspection of Books—Reconstruction—Arbitration—Dissentient Shareholder.—On the reconstruction of a company by way of voluntary winding-up, the liquidator offered to purchase the shares of *M.* a dissentient shareholder at five

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shillings a share; *M.* refused the offer and claimed an arbitration: Held, that pending the arbitration, *M.* was not entitled to have inspection of the books, which had been transferred to the new company. (V.C. B., Nov. 27, 1884.) *Re Glamorganshire Banking Company, Morgan's Case*, 33 W. R. 209; 51 L. T. R. 623.

CONTRACT.—*Sale—Property in materials for making Railway—Engineer's certificate—Injunction.*—Where under a contract for making a railway the company's engineer was to certify monthly the amount of materials brought on the land and work done by the contractor, and the amount due therefor was to be paid by the company seven days after the certificate, the Court held that materials brought on the land by the contractor and certified, though unused, were the property of the company, and restrained their removal by injunction. (Pearson J., Dec. 13, 1884.) *Banbury and Chelt nham Railway Co.* v. *Daniel*, 33 W. R. 321; 54 L. J., Q. B. 265.

COPYRIGHT.—*Design—Infringement—'New or Original'—The Masher Collar—Substantial Novelty—Patents, Designs, and Trade Marks Act.*—In an action for infringement of a registered design for a collar, the Court being of opinion that there was no substantial novelty or originality in the design, and that it ought not to have been registered, ordered it to be removed from the register. (C. A., Nov. 5, 1884.) *Le May* v. *Welch, Margetson & Co.*, 28 Ch. D. 24; 33 W. R. 33.

COUNTY COURT—*Bailiff—Action against—Want of jurisdiction—Protection.*—Sect. 19 of 13 & 14 Vict., c. 61, effectually protects the registrar and high bailiff of a County Court from an action for anything done as a ministerial agent under a warrant duly sealed, even though the warrant was irregularly issued by reason of the judge having no jurisdiction: the bailiff is not protected if he proceeds irregularly under the warrant. (C. A., Dec. 9, 1884.) *Aspey* v. *Jones*, 54 L. J., Q. B. 98; 33 W. R. 217.

COVENANT.—*Restrictive Covenant.—Building scheme—Breach—Injunction—Acquiescence—Lord Cairns' Act.*—Where allottees under a building scheme had entered into mutual restrictive covenants not to use the houses erected on the lots as shops, and one of such allottees, after being aware for more than three years that another allottee was using his house as a beershop, applied for an injunction, the Court held that he had disentitled himself by acquiescence to enforce the covenant. Mere change in the character of the neighbourhood, unless it has been caused by the conduct of the plaintiff, as in *Duke of Bedford* v. *Trustees of British Museum*, does not affect the right to enforce such a covenant. The Chancery Division has since the Judic. Act full jurisdiction, independently of Lord Cairns' Act, either to grant an injunction or to assess damages. (C. A., Nov. 8, 1884.) *Sayers* v. *Collyer*, 28 Ch. D. 103; 54 L. J., Ch. 1; 33 W. R. 91.

CRIMINAL LAW.—*Falsification of Accounts Act—'Making false entry'—Giving in false memorandum.*—*B.* a collector of debts, with intent to defraud, handed to his employer's clerk a memorandum which he had written as follows, 'Sheppard on account 5*l.*,' and the clerk copied the memorandum into the cash-book; *B.* had in fact received 8*l.* from Sheppard: Held, that he had properly been convicted of making or concurring in making a false entry within the meaning of the Falsification of Accounts Act, 1875. (C. C., Nov. 29, 1884.) *Reg.* v. *Butt*, 51 L. T. R. 607.

Indecent exposure—Public place—Trespass.—A person is liable to be convicted upon an indictment for indecently exposing his person in a public place, if he does so in a place where the public are though the public may have no right to be there. Semble it is not necessary to allege that the indecent exposure was in a public place. (C. C. R., Nov. 29, 1884.) *Reg.* v. *Wellard*, 14 Q. B. D. 63; 54 L. J., M. C. 14; 33 W. R. 156; 51 L. T. R. 604.

Vagrancy Act—'Frequenting' street—Reputed thief.—A reputed thief who is found in a street etc. with intent to commit a felony, does not 'frequent' the street within the meaning of sect. 4 of the Vagrancy Act, 1825, if there is no evidence that he has been in the street more than once. (Dec. 1, 1884.) *Reg.* v. *Clark*, 14 Q. B. D. 92; 33 W. R. 226.

DONATIO MORTIS CAUSA.—*Cheque payable to donor—Validity.*—*C.* made a donatio mortis causâ of an unendorsed cheque payable to *C.* or order: Held, a valid donatio mortis causâ, there being no difference between such a cheque and an inland bill of exchange or promissory note. (Chitty J., July 30, 1884.) *Clement* v. *Cheeseman*, 27 Ch. D. 631; 54 L. J., Ch. 158; 33 W. R. 40.

EASEMENT.—*Light—Rebuilding—Ancient lights—Intention to abandon—Enlargement—Injunction—Damages.*—A building containing ancient lights was pulled down, a record being made at the time of the position of the ancient lights. It was afterwards rebuilt, the windows comprising in some cases the whole, in others portions of the area of the old windows, but materially altered and enlarged: Held, that there had been no abandonment of the ancient lights by the owners, and the Court, in an action by them to restrain the erection of a large building opposite which would have darkened such ancient lights, granted upon the balance of convenience an injunction in preference to taking an undertaking from the defendants to pull down if required to do so. *Per* Cotton L.J. A new window replacing an ancient light to be entitled to continuance of the right to light must include substantially the area of the old light; it is not enough for it to be coincident with a portion of it. (C. A., May 1, 1884.) *Newson* v. *Pender*, 27 Ch. D. 43.

EDUCATION.—*School Board—Taking land compulsorily—Collateral arrangement for exchange—Statutory powers.*—A School Board served on *R.* a notice to treat for the purchase of land belonging to him for the erection of a school, having at the time of the notice accepted (subject to the approval of the Education Department) an offer by *B.* to exchange part of the land so to be acquired from *R.* for a piece of *B.*'s. *B.* had undertaken to make a road out of the piece given him by the Board in exchange, and to dedicate it to the public; and this scheme would be very beneficial to the new school: Held, on an application by *R.* for an injunction, that the Board were acting bonâ fide, and within their statutory powers. (Chitty J., Aug. 11, 1884). *Rolls* v. *London School Board*, 27 Ch. D. 639; 33 W. R. 129; 51 L. T. R. 567.

ELECTION.—*Gift of stock belonging to Wife—Legacy to Wife—Equity against Wife's representatives.*—A husband by his will gave his wife a legacy of 3000*l.* and bequeathed the residue of his estate, comprising inter alia all his money in the public funds standing in his name jointly with his wife, to trustees upon trust to pay the income to his wife for life, and afterwards for his brothers and sisters absolutely. A sum of 7000*l.* was standing at the testator's death in his name jointly with his wife: Held, that though his wife was absolutely entitled by right of survivorship to the 7000*l.*, she must be put to her election, and if she claimed the 7000*l.* surrender the legacy of 3000*l.* to compensate the disappointed residuary legatees. The same equity arising out of the doctrine of election would apply to the wife's legal personal representation. (Kay J., June 28, 1884.) *Carpenter*: *Carpenter* v. *Disney*, 51 L. T. R. 773.

Married Woman—Compensation—Restraint on anticipation.—No question of election arises in the case of a married woman where the property which ought to be sequestrated to make compensation under the doctrine of election is property which she is restrained from anticipating. (Chitty J., July 14, 1884). *Re Wheatley, Smith* v. *Spence*, 27 Ch. D. 606; 54 L. J., Ch. 201.

Married Woman—Compensation—Restraint on alienation—Doctrine of election.—A married woman will be put to her election though the only property available to make compensation to the person disappointed by her election is property which she is restrained from alienating. Under the doctrine of election the Court sequesters the interest of the refractory donee: it does not call upon the donee to assign it. (Kay J., Nov. 19, 1884.) *Re Vardon's Trust*, 28 Ch. D. 124; 54 L. J., Ch. 244; 33 W. R. 297; 51 L. T. R. 884.

EVIDENCE.—*Hearsay—Infant defendant—Declaration by deceased father—Pedigree.*—In an action for goods sold and delivered, defendant pleaded infancy: Held, that an affidavit made in a Chancery suit to which the plaintiff was not a party, by the defendant's deceased father, as to defendant's age, was inadmissible, the question at issue not being one of pedigree, so as to take it out of the rule excluding hearsay evidence.

EVIDENCE—(continued).

(C. A., Aug. 11, 1884.) *Haines* v. *Guthrie*, 13 Q. B. D. 818; 53 L. J., Q. B. 521; 33 W. R. 99; 51 L. T. R. 645.

Solicitor and Client—Communications between—Fraudulent design—Privilege.—Communications made by a client to his solicitor in furtherance of any criminal or fraudulent purpose are not privileged though the solicitor was ignorant of the purpose in view. In determining whether the evidence ought to be received or rejected, the Court must consider in each particular case whether the facts make it probable that the communications were for a criminal or fraudulent purpose or not. (C. C. R., Nov. 20, 1884.) *Reg.* v. *Cox and Railton*, 14 Q. B. D. 153; 54 L. J., M. C. 41.

EXECUTOR—*Administration action—Costs—How borne—Realty descending by forfeiture—Realty specifically devised.*—Real estate devised but descending to the testator's heir-at-law by reason of a forfeiture is not applicable as descended real estate for payment of the costs of administration in priority to freeholds and leaseholds specifically devised and bequeathed. (Pearson J., Dec. 1, 1884.) *Hurst* v. *Hurst*, 28 Ch. D. 159.

Administration action—Deficient estate—Annuities—Apportionment—Legacy Duty—Costs—Legatee's action.—A testator's estate was insufficient to pay in full two annuities given by him. One annuity was not liable to legacy duty, the other was given free of duty: Held, that the right mode of apportioning the annuities was to deduct from the whole fund available for their payment the legacy duty payable on the annuity liable to duty, as abated, and then to apportion the fund between the annuitants, as in *Heath* v. *Nugent* (29 Beav. 226). A legatee plaintiff in an administration action is entitled to costs as between solicitor and client out of the estate, though it is insufficient for payment of legacies in full. (Pearson J., Aug. 8, 1884.) *Re Wilkins, Wilkins* v. *Rotherham*, 27 Ch. D. 703; 33 W. R. 42.

Administration action—Voluntary Settlement—Payment into Court—Costs—Creditors.—The trustee of a voluntary settlement, which was void against creditors, on the settlor's death paid the fund, amounting to 580*l.*, into Court. In a beneficiary's action for administration the debts were found to be 504*l.*: Held, that the clear balance of 76*l.* had been properly ordered to be paid to the trustee, though it left the creditors only a dividend after payment of the costs of the action. (V.C. B., Aug. 4, 1884.) *Re Turner, Turner* v. *Turner*, 51 L. T. R. 497.

Administration of Assets—Unregistered Judgment—Priority—Devisee—Right of retainer.—An unregistered judgment creditor has no priority in the administration of assets over simple contract creditors under 23 & 24 Vic. c. 38. s. 3. A devisee or heir-at-law who is also a simple contract creditor has no right of retainer out of the proceeds of sale of the real estate, such proceeds being made equitable assets by 3 and 4 Will. IV. c. 104. Secus if he is a specialty creditor and the heirs are bound. (C. A., July 25, 1884.) *Re Illidge, Davidson* v. *Illidge*, 27 Ch. D. 478; 53 L. J., Ch. 991; 33 W. R. 18; 51 L. T. R. 523.

Administration of Assets—Domiciled Foreigner—English Creditor—Foreign Creditor—Priority.—English creditors of a deceased domiciled foreigner are not entitled to be paid out of the English assets in priority to foreign creditors. (Pearson, Dec. 8, 1884.) *Re Klaebe, Kannrenther* v. *Geiselbrecht*, 28 Ch. D. 175; 54 L. J., Ch. 297.

Administrator de son tort—Share in Company—Beneficial interest—Transfer—Cause of Action.—*B.* an administrator was entitled as sole next of kin of *A.* his intestate to a share in a gas company, he died without dealing with the share, and his administratrix sold the share without taking out administration de bonis non to the estate of *A.* All *A.*'s debts were paid: Held, that *B.*'s estate being entitled to the beneficial interest in the share no action could lie at the suit of a person who had taken out administration de bonis non to *A.*'s estate against the bank for permitting a transfer of the share. (North J., Nov. 28, 1884.) *Clark* v. *South Metropolitan Gas Co.*, 54 L. J., Ch. 259; 33 W. R. 160.

Devastavit—Lâches of Creditor—Misleading Executors.—*C.*, a creditor of a deceased farmer, forbore for ten years to press the executors for payment. The executors under the trusts of the will carried on the farm, and lost nearly all the assets: Held, on the evidence, that *C.* had not misled the executors either by conduct or express authority,

EXECUTOR—(continued).

and that the executors were liable for a devastavit. Mere lâches does not deprive a creditor of his right to sue for a devastavit. (Chitty J., July 30, 1884.) *Re Birch, Roe* v. *Birch*, 27 Ch. D. 622; 33 W. R. 72.

Retainer—Administration Judgment—Debt of Record—Specialty Debt.—A creditor in an administration action obtained an order for payment of his debt by the executor. After the order the executor, who was also a mortgagee under a mortgage made by the testator, claimed to retain the mortgage debt out of the assets: Held, that as a specialty creditor, he was not entitled to do so, so as to give himself priority over the judgment creditor. (V.C. B., June 21, 1884). *Re Hubback, International Marine Hydropathic Co.* v. *Hames*, 51 L. T. R. 189.

FRAUDULENT CONVEYANCE.—*Omitting to impeach—Lâches—Statute of Limitations.*—A creditor allowed a deed fraudulent under 13 Eliz. c. 5 to remain unimpeached for ten years, and afterwards brought an action to set it aside: Held, that lâches could not be imputed to him, for no lapse of time short of that fixed by the Statute of Limitations would bar his legal right to set aside the deed. Secus if the deed were impeached on equitable grounds. (C. A., July 28, 1884.) *Re Maddever, Three Towns Banking Co.* v. *Maddever*, 27 Ch. D. 523; 53 L. J., Ch. 998.

GIFT.—*Transfer of Stock into Joint Names—Intention of Benefiting—Resulting Trust—Irrevocable Gift.*—A widow of eighty-six transferred 6,000*l.* Consols into the joint names of herself and *B.* her godson, but without *B.*'s knowledge. There was evidence to show that she had made the transfer with a view of benefiting *B.* She afterwards married again and required *B.* to retransfer the stock: Held, upon the evidence, that there was no resulting trust for the widow, but an irrevocable gift by her, and that *B.* was not compellable to retransfer. (Pearson J., July 1, 1884.) *Standing* v. *Bowring*, 27 Ch. D. 341; 54 L. J., Ch. 10; 51 L. T. R. 591; 33 W. R. 79.

HIGHWAY.—*Repair—Extraordinary Traffic—Stone Wagons—Agricultural Road.*—The *S.* highway board brought stone for the repair of their roads from a hill quarry opened in 1882 down an agricultural road repairable by the *T.* board. The road was a steep one and necessitated the wheels of the wagons being chained in the descent, which tore up the road and had greatly increased the cost of repairs since 1882: Held, that there was evidence to justify the justices in finding the traffic to be 'extraordinary traffic' within s. 23 of the Highways and Locomotives Amendment Act, 1878, and that the *T.* board were entitled to recover from the *S.* board the extra expenses occasioned thereby. (Nov. 28, 1884.) *Tunbridge Highway District Board* v. *Sevenoaks Highway District Board*, 33 W. R. 306.

Repair—Highway in Borough—County Authority—Contribution—'County.'—The highway authority of a borough claimed, under sect. 13 of the Highways and Locomotives Amendment Act, 1878, from the county authority, one half of the expenses of maintaining a disturnpiked road passing through the borough: Held, that though the word 'county' by the Highway Act, 1862, excludes boroughs for the purposes of that act, 'county' must in sect. 13 of the Highways and Locomotives Act be treated as a geographical description, and that the county authority was liable to contribute. (C. A., Dec. 8, 1884.) *Corporation of Owen Darwen* v. *J. J. of Lancaster*, 54 L. J., M. C. 51; L. T. R. 739.

HUSBAND AND WIFE.—*Alimony—Inalienability—Lunacy of Husband.*—A husband who had been ordered under a decree for a judicial separation to pay 60*l.* a year to his wife as alimony became lunatic, and the Lords Justices in Lunacy made an allowance of that amount to the wife out of the lunatic's estate. The wife assigned the annuity, and the assignee presented a petition for payment of the dividends to him: Held, that whether considered as alimony or an allowance by the Lord Justices in Lunacy, the annuity was equally inalienable by anticipation. (C. A., July 14, 1884.) *Re Robinson*, 27 Ch. D. 160; 53 L. J., Ch. 986.

Divorce—Adultery of Petitioner—Respondent guilty of Rape—Discretion of Court.—A wife petitioned for dissolution of her marriage by reason of her husband having been convicted of rape and committed various acts of cruelty. Adultery had been proved

HUSBAND AND WIFE—(continued).

against the wife in a previous suit for dissolution by the husband, but the husband had afterwards cohabited with her: Held, that the Court had jurisdiction to grant a decree *nisi* notwithstanding the wife's previous misconduct. (July 8, 1884.) *Collins* v. *Collins*, 9 P. D. 231; 53 L. J., P. D. & A. 116; 33 W. R. 170.

Divorce—Decree Nisi—Rescission—Reconciliation.—Decree *nisi* for dissolution of marriage made on the petition of the wife, rescinded at the instance of the petitioner, upon evidence that she and her husband were reconciled, and that he had notice of the application. (June 17, 1884.) *Troward* v. *Troward*, 32 W. R. 864.

Divorce—Desertion—From when dating—Adultery.—A husband absented himself from his wife on the plea of business from 1880, visiting her only at long intervals. In 1884 the wife discovered that he had been living during the time with another woman: Held, that the wife was not entitled to a dissolution on the ground of the husband's adultery and desertion for two years. Semble the desertion commenced from the time when the wife discovered the adultery. (Aug. 9, 1884.) *Farmer* v. *Farmer*, 9 P. D. 245; 53 L. J., P. D. & A. 113; 33 W. R. 169.

Judicial separation—Order for, by Justices—Aggravated Assault.—Where justices had made an order for a judicial separation under 41 Vict. c. 19. s. 4, on the ground of an aggravated assault by the husband, the Court on appeal refused to discharge the order because, in addition to ordering a weekly payment by the husband, the justices had inflicted a nominal penalty as for a common assault. (Butt J., Nov. 11, 1885.) *Wood* v. *Wood*, 33 W. R. 323.

Marriage settlement—Antenuptial parole agreement—Bankruptcy of Husband—Statute of Frauds—Wife's equity to a settlement.—An intended husband before the marriage, which was anterior to the Married Women's Property Act, 1882, verbally agreed that a sum of money standing to the credit of the intended wife at a bank, should belong to her for her separate use, but no transfer to trustees was made. For some years after the marriage the wife continued to receive the interest. The husband afterwards filed a liquidation petition. Held, that the settlement being void under the Statute of Frauds for want of writing, the trustee was entitled to the money subject to the wife's equity to a settlement, if any. (Nov. 24, 1884.) *Re Whitehead, Ex parte Routh*, 33 W. R. 230.

Marriage settlement—Nullity of Marriage—Transfer of settled property.—Where a wife's property had been settled on her marriage and the marriage had been annulled on the ground of the husband's impotency, the Court ordered the trustees of the settlement to re-transfer the property to the wife free from the trusts. (Dec. 16, 1884.) *Addington* v. *Mellor*, 33 W. R. 232.

Married woman—Marriage before Act—Reversionary interest falling into possession after Act—Married Women's Property Act.—A married woman became entitled before the commencement of the Married Women's Property Act, 1882, to a vested reversionary interest in a fund which fell into possession after the commencement of the Act: Held, that she was entitled under sect. 5 of the Act to such interest as separate property. (Chitty J., July 12, 1884.) *Baynton* v. *Collins*, 27 Ch. D. 604; 53 L. J., Ch. 1112; 33 W. R. 41.

Married woman—Tort—Right to sue alone—Married Women's Property Act.—A married woman may by virtue of the Married Women's Property Act 1882, s. 1. subs. 2, bring an action for tort without joining her husband though the tort was committed before the commencement of the Act. (C. A., July 31, 1884.) *Weldon* v. *Winslow*, 13 Q. B. D. 784; 53 L. J. 528; 51 L. T. R. 643.

Separate property—Authority by husband to third party to enter upon—Trespass—Slander—Special damage.—Where a wife is in sole possession of a house which is her separate property, the husband, even if he can by virtue of his marital rights enter the house himself, cannot delegate the right to do so to a third person. Annoyance or loss of reputation is not a special damage sufficient to render actionable, words not actionable per se. (C. A., Dec. 18, 1884.) *Weldon* v. *De Bathe*, 14 Q. B. D. 339; 54 L. J., Q. B. 113; 33 W. R. 328.

HUSBAND AND WIFE—(continued.)

Separate property—'Contract'—Reference by consent—Married Women's Property Act, 1882.—In an action brought before the commencement of the Married Women's Property Act, by a creditor against a married woman, the married woman after the commencement of the Act consented to an order of reference and to be bound by the award: Held, that reference by such consent constituted a contract within sect. 1. (3) of the Married Women's Property Act, 1882, charging under sect. 1 (4) any separate property which she had at or after the date of the order. Sect. 1. cls. (3) (4) are not retrospective. (Chitty J., August 8, 1884.) *Conolan* v. *Zealand*, 27 Ch. D. 632.

Separate Property—Restraint on anticipation—Mortgage.—Real estate was settled upon trust to pay the rents and annual proceeds to *W.*, a married woman, for her separate use, 'her receipts for the said rents and annual proceeds to be given after the same shall become due to be good and effectual discharges:' Held, that the provision constituted a restraint on anticipation, and that a mortgagee of *W.*'s life interest took nothing. (Kay J., July 24, 1884.) *Re Smith, Chapman* v. *Wood*, 51 L. T. R. 501.

Separation Deed—Custody of Children—Access by Wife—Husband's right to remove Children.—By the terms of a separation deed the husband, who was an officer in the British army, was to retain the custody of the children, covenanting to allow the wife 'full and free access' to the children. Held, that such covenant did not debar the husband from taking the children to Egypt, to which place his regiment had been ordered. (Pearson J., Nov. 26, 1884.) *Hunt* v. *Hunt*, 33 W. R. 157.

Separation Deed—Molestation—Adultery—Right to recover Annuity.—Adultery, though followed by the birth of a child, is not 'molestation' by a wife so as to disentitle her to recover an annuity payable to her under a separation deed. Molestation means some act done by the wife with *the purpose of* annoying the husband. A dum casta clause is not to be inserted by implication in a separation deed on grounds of public policy. (A., Nov. 18, 1884.) *Fearson* v. *Aylesford*, 54 L. J., Q. B. 33; 33 W. R. 331.

Wife's Property—Separate examination—Married Women's Property Act—Property acquired before—Settled Estates Act.—A woman married before the commencement of the Married Women's Property Act, 1882, must still be separately examined on a petition under the Settled Estates Act, 1877, if her interest in the property to which the petition relates was acquired before the commencement of the Married Women's Property Act. (Pearson J., Dec. 6, 1884.) *Re Harris' Settled Estates*, 28 Ch. D. 171; 54 L. J., Ch. 208; 51 L. T. R. 855.

INFANT.—*Advancement—Contingent Interest—Application to Charge.*—Where an infant was entitled to a legacy contingently on his attaining 21, the income to be paid to his father for maintenance, and the amount of maintenance being inadequate, the father had advanced a sum of 200*l.* for the outfit of the infant: the Court refused to charge the amount so advanced on the infant's contingent interest. In such a case the proper course is to apply for an order, as in *Re Arbuckle* (14 L. T. R. 538). (Kay J., July 31, 1884.) *Re Tanner*, 53 L. J., Ch. 1108; 51 L. T. R. 507.

Education—Direction of Court—Deceased Protestant Father—Catholic Mother out of Jurisdiction—Brutum fulmen.—Where infant children of a deceased Protestant father were residing out of the jurisdiction under charge of their mother, who was a Roman Catholic and one of the testamentary guardians, but had property within the jurisdiction, the Court in an action by the other guardians to have them made wards of the Court made an order declaring that they ought to be brought up in the Protestant faith. (Pearson J., Oct. 29, 1884.) *Re Montagu, Re Wroughton, Montague* v. *Festing*, 28 Ch. D. 82; 33 W. R. 322.

Ward of Court—Taking out of Jurisdiction—Leave—Security for Production.—Where the mother of a ward of Court who was also sole guardian was desirous of taking the ward to reside with her in Jamaica, the Court gave her leave to do so upon a co-guardian resident in England being appointed and both guardians undertaking to produce the ward when required. In granting leave to remove a ward out of the jurisdiction the Court is guided by what is most for the interest of the ward.

INFANT—(continued).

(C. A., Dec. 1, 1884.) *Re Callaghan, Elliott* v. *Lambert*, 28 Ch. D. 186; 54 L. J., Ch. 292; 33 W. R. 157.

INJUNCTION.—*Costs—Innocent Infringement of Copyright—Notice before Action.*—The owner of a registered design which has been infringed need not give the infringer, though he has committed the infringement innocently, notice before issuing his writ. The infringer's only course is to submit to an injunction and pay the costs. (Pearson J., May 3, 1884.) *Wittman* v. *Oppenheim* (No. 2), 27 Ch. D. 260; 54 L. J., Ch. 56.

Mandatory Injunction – Statutory Contract not to make Goods Station—Breach of—Acquiescence—Public Convenience.—By an Act of Parliament authorising the construction of a railway there was to be 'at the station at *B.* no goods or cattle station;' during the absence abroad of *P.*, the owner of the adjoining estate, the company had constructed a siding and goods-shed within 140 yards of the passenger station at *B.*: Held, that *P.* was entitled to a mandatory injunction against the company to remove the works as a breach of the statutory contract and had not forfeited his right by any acquiescence: Held also, that as between *P.* and the company public convenience did not enter into the question. Lâches in the case of a nuisance or natural right is different from lâches in the case of a contract right. (Chitty J., May 6, 1884.) *Price* v. *The Bala Festiniog Railway Company*, 50 L. T. R. 787.

Name of Company—Similarity—Liability to deceive.—Injunction granted at the instance of a company registered in 1849 as the Accident Insurance Company to restrain a company registered in 1883 as the Accident, Disease and General Insurance Company from carrying on a similar business under that name as calculated to mislead the public. (Pearson J., July 18, 1884.) *Accident Insurance Company* v. *Accident, Disease and General Insurance Company*, 54 L. J., Ch. 104; 51 L. T. R. 597.

Patentee—Warning Circular—Action to Restrain—Bona Fides.—A patentee who issues circulars warning merchants and others that articles made by a rival patentee are infringements of his patent will not be restrained by interlocutory injunction if he makes the statement honestly in defence of his own title. (Kay J., May 8, 1884.) *Household & Rosher* v. *Fairburn & Hall*, 51 L. T. R. 498.

Trade Mark—Design—Infringement—Injunction or Account—Costs.—Where the plaintiffs in an action for fraudulent imitation by defendants of a design registered by the plaintiffs had made out a *prima facie* case, the Court of Appeal affirmed the judgment of the Court below granting an injunction against defendants in preference to ordering an account to be kept. Costs not allowed on the higher scale. (C. A., June 10, 1884.) *Grafton* v. *Watson*, 51 L. T. R. 141.

Water Supply—Cutting off—Rate—Bona fide Dispute—Jurisdiction—Undertaking. Where there was a bona fide dispute between a water company and the owner of a number of houses as to their annual value and the company threatened to cut off the water-supply, the Court, while holding that it had jurisdiction notwithstanding s. 68 of the Waterworks Clauses Act to grant an injunction, refused it, the owner of the houses declining to undertake to commence proceedings to have the dispute as to value determined before two justices. (Chitty J., Nov. 11, 1884.) *Hayward* v. *East London Waterworks Company*, 28 Ch. D. 138.

INSURANCE.—*Life policy—Untrue answers to questions—'Temperate'—Matter of opinion.*—*W.* being desirous of effecting an insurance on his life, in answer to one of several questions contained in a printed form of proposal of an Insurance Co., stated that he was 'strictly temperate' in his habits. He also signed a declaration that the statements were true, and agreed that they should be the basis of the contract. *W.* was at the time intemperate, even judged by the standard of the place where he lived: Held, on his death from drinking, eight months afterwards, that he had expressly warranted the truth of his statement in point of fact and not as matter of opinion; and it being untrue, the policy was avoided. (H. L., Aug. 1, 1884.) *Thompson* v. *Weems*, 9 App. Cas. 671.

Marine—Re-insurance—Notice of abandonment—Sue and Labour Clause—Liability of Re-insurers.—Where a re-insurance has been effected on a ship, notice of abandonment given to the original insurers only is sufficient. A re-insurance policy on a ship contained

INSURANCE—(continued).

a sue and labour clause in favour of the assured, 'their factors, servants and assigns:' Held, that the clause applied only to the original assured and did not entitle the underwriters to recover from the re-insurers expenses incurred by the underwriters under a sue and labour clause in the original policy. (C. A., Nov. 10, 1884.) *Uzielli* v. *Boston Marine Insurance Company*, 54 L. J., Q. D. 142; 33 W. R. 293.

JUSTICES.—*Case stated by—Abandonment of appeal—Costs—Jurisdiction.*—Where a case stated by justices under 20 & 21 Vict. c. 43 had been remitted for further information and not returned within the proper time: Held, on motion to dismiss the appeal, that the appeal having been abandoned, the Court had jurisdiction to order the appellant to pay the respondent's costs. (June 30, 1884.) *Crowther* v. *Boult*, 13 Q. B. D. 680; 33 W. R. 150.

Jervis's Act—Application—Protection of Justices—Mandamus.—Sect. 5 of Jervis's Act (11 & 12 Vict. c. 44) is not limited in its application to cases in which the justices need protection. (April 2, 1884.) *Reg.* v. *Phillimore*, 51 L. T. R. 206.

Jervis's Act—Rule to show cause—Mandamus—Concurrent remedies.—A rule under Jervis's Act calling upon justices to show cause why they should not proceed to hear and determine a matter, is not limited to cases where the justices need protection in the performance of their duties, but is a remedy concurrent with mandamus. (Oct. 25, 1884.) *Reg.* v. *Biron*, 51 L. T. R. 429.

LANCASTER, DUCHY OF.—*Information in High Court by Attorney-General of Duchy—Usurpation—Removal from file.*—Information exhibited in the High Court of Justice by the Attorney-General of the Duchy of Lancaster ordered to be taken off the file as an usurpation though the defendant, who made the application, had filed an answer. (Dec. 20, 1884.) *Attorney-General of Duchy of Lancaster* v. *Duke of Devonshire*, 14 Q. B. D. 195.

LANDLORD AND TENANT.—*Building lease—Reservation of minerals—Digging foundation—Brick making—Spoil bank—Property in.*—The owner of the surface of land granted a building lease to *M.*, reserving minerals: Held, that *M.* was entitled as against antecedent lessees of the underlying minerals to dig foundations for the purpose of building, but not to use the soil for carrying on a brick-making trade. Lessees of minerals held to have the property in a spoil bank consisting of rubbish brought from the mine. (North J., Aug. 12, 1884.) *Robinson* v. *Milne*, 53 L. J., Ch. 1070.

Land Law (Ireland) Act—'Holding let to be used wholly or mainly for pasture.'—A farm in Ireland was demised for twenty-one years from 1861, the lessee covenanting for good husbandry and that he would not without the lessor's consent break up or have in tillage in any one year more than ten acres. At the time of the demise only fifteen acres out of 123 were in tillage, the rest being used as pasture, though it was not ancient pasture. The farm was used by the lessee as a dairy farm: Held, that it was not a 'holding let to be used wholly or mainly for the purpose of pasture' within sect. 58. subs. 3 of the Land Law (Ireland) Act, 1881. (H. L., July 7, 1884.) *Westropp* v. *Elligott*, 9 App. Cas. 815.

Lease—Restrictive covenant—Hospital—Profit.—A lease contained a covenant by the lessee not to use the house for 'the exercise or carrying on of any art, trade, or business, occupation, or calling:' Held, that the lessee had committed a breach of the covenant by using the house as a hospital, though not for the purpose of profit. (Jessel M.R., Dec. 1, 1879.) *Portman* v. *Home Hospitals Association*, 27 Ch. D. 81 *n.*; 50 L. T. R. 599 *n.*

Lease for lives—Covenant for removal—Construction.—A demise of hereditaments, to *A.*, for the natural lives of *A.* and two other persons contained a covenant by the lessor, 'as often as one or two lives of and in the said hereditaments' should drop to renew 'for any other life or two lives of any other person or persons to be nominated by the lessor in the stead of the person's life or lives so dropping': Held, not a perpetual covenant for renewal, but limited to a right of renewal as often as any of the original lives should drop. (H. L., August 4, 1884.) *Swinburne* v. *Milburn*, 9 App. Cas. 844; 33 W. R. 325; 54 L. J., H. L. 6.

LANDLORD AND TENANT—(continued).

Trespasser—Right to eject—'Possession'—Re-entry—Relief—Conveyancing Act.—A trespasser does not by the mere act of entering upon premises immediately and without acquiescence give himself what the law understands by 'possession.' In such a case the lawful owner may use reasonable force to eject the trespasser and need not appeal to the law for assistance. Sect. 14 of the Conveyancing Act, 1881, giving the Court power to relieve against forfeiture, does not apply to re-entry for non-payment of rent. (Kay J., Nov. 11, 1884.) *Scott* v. *Matthew Brown & Company*, 51 L. T. R. 746.

LANDS CLAUSES ACT.—*Compensation—Hotel injuriously affected—Depreciation of market value.*—A railway company by their works blocked up a road and injuriously affected an hotel which stood in it: Held, that the owner was entitled to compensation not only for the premises being injuriously affected, but for depreciation of their marketable value. (Dec. 10, 1884.) *Re Wadham and North-Eastern Railway Co.*, 33 W. R. 215.

Compensation—Land 'injuriously affected'—Sewage farm.—A local board acting under their statutory powers took building land belonging to *A.* for the purpose of a sewage farm: Held, that *A.* was entitled to compensation for the depreciation of remainder of his land adjacent to the proposed sewage farm as land 'injuriously affected' within sect. 68 of the Lands Clauses Act, though he could not have recovered compensation under the section had no land of his been taken. (Dec. 12, 1884.) *Reg.* v. *Essex*, 33 W. R. 214.

Costs—Power to award—Entry on land—'Taking land.'—A railway company entered upon land with the requisite formalities under sect. 85 of the L. C. C. A. The company afterwards obtained leave to abandon it on paying compensation, and entered into an agreement with the landowner as to the amount of compensation: Held, that the Court had power to allow the costs of such agreement out of the moneys deposited in Court as incident to the 'taking of land' within sect. 80. (Kay J., *affirmed.*) (A., Nov. 10, 1884.) *Charlton* v. *Rolleston*, 28 Ch. D. 237; 54 L. J., Ch. 233; 51 L. T. R. 612.

Payment out—Trustees for sale—'Party becoming absolutely entitled.'—Fund in Court representing purchase-money paid in by a railway company for land taken under the Lands Clauses Act ordered to be paid out to trustees for sale of the fund as a 'party becoming absolutely entitled' within the meaning of sect. 69 of the Act, the railway company consenting. (Pearson J., Nov. 15, 1884.) *Re Ward's Estates*, 28 Ch. D. 100; 54 L. J., Ch. 231; 33 W. R. 149.

Taking lands—'House' paddock—Cutting off access to road.—A railway company gave notice to the owner of a property, consisting of a house, garden, and paddock with a road at the back and front, of their intention to take part of the paddock and the private road leading to the road at the back of the house. The paddock was entered by a gateway in the garden-wall, and was surrounded by an ornamental hedge: Held, that the paddock was part of the house, within sect. 92 of the L. C. C. A., and that the company must take the whole of the property. (V.C. B., June 28, 1884.) *Barnes* v. *Southsea Railway Co.*, 27 Ch. D. 536; 32 W. R. 976.

LIMITATIONS (STATUTE OF).—*Annuity charged on land—Non-payment by trustees for more than twelve years—Real Property Limitation Act.*—Real estate was conveyed to trustees upon trust to pay *M.* an annuity of 8*l.* half-yearly. The annuity became payable in 1857, but was never claimed till 1884: Held, that it was a 'rent' within sect. 1 of 3 & 4 Will. IV. c. 27, and that the right to recover any arrears prior to 1884 was barred by the sect. 10 of the Real Property Limitation Act, 1874, as if there were no express trust. (Kay J., July 10, 1884.) *Hughes* v. *Coles*, 27 Ch. D. 231; 53 L. J., Ch. 1047; 33 W. R. 27.

Legacy—Realisation of Reversionary Interest postponed—Bankrupt legatee—Interest.—An undischarged bankrupt was appointed executor and trustee of a will under which he was entitled to a legacy of 2000*l.* The only fund available for payment of the legacy was a reversionary interest which it was not desirable to realise at once. The reversionary interest did not fall into possession until more than six years after the testatrix's death: Held, that the Statute of Limitations did not apply, and that the trustee in bankruptcy in right of the bankrupt was entitled to interest on the

LIMITATIONS (STATUTE OF)—(continued).

legacy, from the expiration of one year from the testatrix's death. (Pearson J., May 28, 1884.) *Re Blackford, Blackford* v. *Worsley*, 27 Ch. D. 676; 33 W. R. 11.

LOCAL GOVERNMENT.—*Public Health Act—Compensation—Disputed liability—Right to proceed to arbitration.*—The determination of the question of liability for damage caused by the exercise of powers given by the Public Health Act, though such liability is disputed, is not a condition precedent to the claimant's proceeding to arbitration under sect. 308, to assess the amount of compensation. (H. L., March 17, 1884.) *The Brierley Hill Local Board* v. *Pearsall*, 9 App. Cas. 595; 54 L. J., H. L. 25; 51 L. T. R. 577.

Public Health Act—Contract by servant with Local Board—Lease—Penalty.—The clerk of a local board leased premises to the board: Held, though the transaction was bonâ fide, that the clerk was liable to the penalty as a servant interested in a 'contract' with the board under sect. 193 of the Public Health Act. (C. A., Nov. 27, 1884.) *Burgess* v. *Clark*, 33 W. R. 269.

Public Health Act—Local Board—Bargain for drainage—Binding successors—New houses.—Where under the Public Health Act, 1848, sect. 48, a local board had, in consideration of an annual payment, for themselves, their successors, and assigns, granted to an adjoining owner of land the right to drain into their sewer from all the houses then belonging to him, and thereafter to be constructed on his property: Held, that the bargain was not ultra vires and bound the urban sanitary authority which had succeeded the local board, though many new houses had been built, and the bargain had turned out badly for the board by reason of their having been subsequently forbidden to drain into the Thames. (North J., August 2, 1884.) *Mayor of New Windsor* v. *Stovell*, 27 Ch. D. 665; 51 L. T. R. 626.

Public Health Act—Nuisance—Abatement of—Ordering specific works—Jurisdiction.—On a summons by a sanitary authority, under sect. 96 of the Public Health Act, 1875, the justices ordered the owner of a privy to abate the nuisance caused by it, and for that purpose to execute certain specified works: Held, that they had jurisdiction to do so. (June 30, 1884.) *Reg.* v. *Llewellyn*, 13 Q. B. D. 681; 33 W. R. 150.

Public Health Act—Paving expenses—Recovery by Urban Authority—Contract not under seal.—A frontager who is sued by a local authority for a proportionate part of the cost of works done by the authority under sect. 150 of the Public Health Act cannot resist payment on the ground that the contract under which the work was done was not under seal as required by sect. 174 of the Act. Such an objection ought to be taken at the date of apportionment by written notice under sect. 257. (Dec. 9, 1884.) *Bournemouth Commissioners* v. *Watts*, 14 Q. B. D. 87; 54 L. J., Q. B. 93; 33 W. R. 280.

LUNACY.—*Costs—Sale of lunatic's property to pay.*—Where the costs of an inquiry in lunacy were unpaid and the lunatic's only property consisted of a mortgage debt, the Court ordered his interest in the mortgaged hereditaments to be sold under section 116 of the Lunacy Regulation Act, 1853, to pay such costs. (C. A., May 3, 1884.) *Re Brown*, 50 L. T. R. 373.

Pauper Lunatic—Expenses of maintenance—Right of Guardians to recover in administration—Lunatic Asylums Act.—Guardians of a union to which a pauper lunatic has become chargeable are entitled after his death to recover against his estate the amount of sums paid for his maintenance at a lunatic asylum, like any other debt in due course of administration. (V.C. B., Aug. 24, 1884.) *Re Webster, Guardians of Derby Union* v. *Sharratt*, 27 Ch. D. 710; 51 L. T. R. 319.

MARKET.—*Market franchise—Grant by Crown over land not belonging to grantee—Limits of market—Market days—Express grant—User.*—The Crown has power to grant a market franchise over another man's land if the grantee can obtain the consent of such owner to the exercise of the right. Where the Crown had granted such market franchise 'in sive juxta' S. Square: Held, that the grantee might, provided the market honestly overflowed, license carts to stand in streets adjoining the market-place. Held, also, as the market was by the grant to be holden on Thursdays and Saturdays it could not be enlarged by any length of user to other days. (C. A., Nov. 4, 1884.) *Attorney-General* v. *Horner*, 14 Q. B. D. 245; 33 W. R. 93.

MASTER AND SERVANT.—*Employers' Liability Act—Injury to servant—Defective brake—Knowledge of servant—Contributory negligence.*—A brakesman with knowledge that the brake of a wagon was defective started the train and in trying afterwards to adjust the brake was injured: Held, in an action against his employers, that he had been guilty of contributory negligence and must be nonsuited. (Dec. 6, 1884.) *Martin* v. *Connah's Quay Alkali Works*, 33 W. R. 216.

Employers' Liability Act—Negligence of person to whose orders workman bound to conform.—A boy employed by the defendant company while assisting a carman, to whose orders he was bound to conform, to unload some iron frames from a van, in the ordinary course of his duty, but without being expressly told to do so, untied one side of the frames while the carman untied the other. The carman removed one frame but without tying up the others, which fell and injured the boy. Held, in an action by the boy against the company, that there was evidence to go to the jury of negligence under sect. 1. subs. 3 of the Employers' Liability Act, 1880. (Dec. 15, 1884.) *Millward* v. *Midland Railway Company*, 14 Q. B. D. 68; 33 W. R. 366.

Scope of authority—Cloak-room clerk bringing parcel to train—Negligence.—A cloak-room clerk at a railway station while running along the platform with a parcel for a passenger upset plaintiff's wife, inflicting injuries which caused her death. The clerk admitted that he used to take parcels from the cloak-room to the train when no porter was there: Held, that he was acting within the scope of his authority and that the company were liable. (March 6, 1884.) *Milner* v. *Great Northern Railway Company*, 50 L. T. R. 367.

MAYOR'S COURT, LONDON.—*Jurisdiction—Prohibition—Cause of action arising in part within City.*—Plaintiff and defendant, neither of whom resided or carried on business within the city of London, entered into a parole agreement outside the city for the sale and purchase of the lease of a shop situated in Surrey. The agreement was embodied in duplicate documents of a formal character, one of which was signed by the defendant at Bow, the other subsequently by the plaintiff within the city: Held, that upon the signature of the defendant there was a complete cause of action, that this cause of action did not arise either wholly or in part in the city of London within 20 & 21 Vict. c. lvii. s. 12, and that prohibition had rightly issued to restrain an action in the Mayor's Court. (Oct. 25, 1884.) *Alderton* v. *Archer*, 14 Q. B. D. 1; 54 L. J., Q. B. 12; 33 W. R. 136.

METROPOLIS.—*Metropolis Management Act—Building line—Certificate of surveyor—Conclusiveness.*—The certificate of the architect of the Metropolitan Board of Works as to the 'general line of building' mentioned in sect. 75 of the Metropolis Management Amendment Act, 1862, is conclusive and cannot be reviewed by a police magistrate on a summons for a breach of the section. (C. A., diss. Brett, M.R., March 11, 1884.) *The Plumstead District Local Board* v. *Spackman*, 53 L. J., M. C. 142; 50 L. T. R. 690.

Metropolitan Local Management Act—District Board putting up posts—Infringement of Market rights—Injunction.—Where a London district board of works were intending to put up posts which would interfere with the plaintiff's market rights the Court granted an injunction to restrain them, holding that the power given by 18 & 19 Vict. c. 120. s. 108, of placing posts, &c., was qualified by sect. 91 expressly excepting market rights. (V.C. B., July 9, 1884.) *Horner* v. *The Whitechapel Board of Works*, 54 L. J., Ch. 148; 51 L. T. R. 414.

Metropolis Management Act—Building line—Order of Magistrate—Notice—Reduction into writing—Service.—*B.* was ordered by a magistrate to pull down the projecting part of a building under sect. 75 of the Metropolitan Management Amendment Act, 1862, within eight weeks. The order was not reduced into writing or served on *B.* until the last day of the eight weeks, but *B.* was present when it was made: Held, that *B.* was bound by the order, the Act being silent as to the time of service. (C. A., June 26, 1884.) *Barlow* v. *Kensington Vestry* (No. 2), 27 Ch. D. 362.

Metropolis Management Act—Rate—Validity—Precept sealed but not served.—A rate made by overseers after notice of the sealing of a precept by a district Board of Works under sect. 158 of the Metropolis Management Act is valid though the precept has

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not been served. (Dec. 5, 1884.) *Glen* v. *Fulham Overseers*, 14 Q. B. D. 328; 54 L. J., M. C. 9; 33 W. R. 165; 51 L. T. R. 856.

Metropolis Local Management Act—Sewer—Pouring mud into—'Soil, rubbish, or filth.'—This sect. of the Metropolis Local Management Act, providing that no scavenger shall sweep any 'soil, rubbish, or filth' into any sewer or drain, includes mud. (March 7, 1884.) *Metropolitan Board of Works* v. *Eaton*, 50 L. T. R. 634.

Metropolis Management Act—Street—Finding of Magistrate—Mandamus—Special Case.—The question whether a road is a street within the meaning of sect. 120 of the Metropolis Local Management Act, 1855, and sect. 102 of the Metropolis Management Amendment Act, 1862, is a question of fact, and not of law, and if a magistrate has found as a fact that a road is a 'street' a mandamus cannot be granted to compel him to state a case. (March 4, 1884.) *Reg.* v. *Sheil*, 50 L. T. R. 590.

Metropolis Management and Building Act—Amendments Act—'Structure'—Continuing offence—Jarvis' Act.—A temporary wooden structure was erected within the metropolitan district without the licence of the Metropolitan Board of Works, but was not complained of for more than six months: Held, that the offence was a continuing one and therefore that Jarvis' Act did not preclude proceedings being taken for recovery of the penalty. (Dec. 5, 1884.) *Metropolitan Board of Works* v. *Anthony & Co.*, 54 L. J., M. C. 39; 33 W. R. 166.

MORTGAGE.—*Costs—Solicitor—Mortgagee—Trust Money—Profit Costs.*—Trustees, one of whom was a solicitor, advanced trust money on mortgage. The solicitor acted for the trustees in realising the security: Held, that he was entitled to charge profit costs against the mortgagor. Any objection by the mortgagor to the allowance of costs in such a case should be stated in the petition for taxation. (V.C. B., July 26, 1884.) *Re Donaldson*, 27 Ch. D. 544; 51 L. T. R. 622.

Foreclosure—Action—Form of Judgment—Personal Judgment.—Form of judgment in a foreclosure action (where the statement of claim was in the form given in Appendix, Form 5 of the Rules of Court, 1883) directing payment on the personal covenant within ten days, account, and foreclosure. (North J., Nov. 28, 1884.) *Lee* v. *Dunsford*, 54 L. J., Ch. 108; 51 L. T. R. 590.

Foreclosure—Form of Judgment—Personal Judgment.—Form of judgment in foreclosure action directing payment on personal covenant by mortgagor, account and foreclosure. Form in *Grundy* v. *Grice* (Seton, 4th ed. 1036), varied. (Pearson J., Dec. 8, 1884.) *Hunter* v. *Myatt*, 28 Ch. D. 181.

NEGLIGENCE.—*Railway Company—Level Crossing—Defect in Gate—Knowledge of Company.*—A gate at a level crossing on a railway was provided with a staple and hasp, a padlock and key, and a spring catch: of these the spring catch was out of repair, and this the Company knew. A horse having been killed by a passing train: Held, in an action by the owner, that there was evidence to go to the jury of negligence by the Company under sect. 68 of the Railway Clauses Act. (Nov. 29, 1884.) *Brooks* v. *London and North Western Railway Co.*, 33 W. R. 167.

NUISANCE.—*Water collecting in Cellar—Percolation into adjoining Cellar.*—*W.* allowed water to collect in the cellar of his house, whence it percolated into the cellar of an adjoining house: Held, that having brought the water on his property, *W.* was bound to 'keep it in at his peril,' and not having done so was answerable in damages. (Kay J., July 14, 1884.) *Snow* v. *Whitehead*, 27 Ch. D. 588; 53 L. J., Ch. 885; 33 W. R. 128; 51 L. T. R. 253.

PARTITION.—*Sale out of Court—Infant Plaintiffs—Jurisdiction.*—The Court has no jurisdiction to direct a sale out of Court in a partition action, where some of the parties interested are infants, and the trustees have no power of sale. (Chitty J., July 26, 1884.) *Strugnell* v. *Strugnell*, 27 Ch. D. 258; 53 L. J., Ch. 1167; 33 W. R. 30; 51 L. T. R. 512.

PARTNERSHIP.—*Sharing Profit and Loss—Evidence of Partnership—Intention.*—An agreement was entered into between a firm and a clerk of the firm, by which the clerk

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was, in return for his services, in addition to salary, to receive a share of the profits and bear a share of the losses: Held, on construction of the agreement, that the relation of partnership was not constituted or intended to be. Sharing profits and losses, as between alleged partners themselves, is only *prima facie* evidence of partnership. (C. A., July 31, 1884.) *Walker* v. *Hirsch*, 27 Ch. D. 460; 32 W. R. 992; 51 L. T. R. 481.

PATENT.—*Patent Designs and Trade Marks Act—Petition for Revocation—Interrogatories—Leave to Administer.*—On a petition for revocation of a patent under sect. 26 of the Patent Designs and Trade Marks Act, 1883, the Court gave leave to the petitioner to administer interrogatories to the respondent under O. 31, R. 1 of the Rules of Court, 1883. (Kay J., August 7, 1884.) *Re Haddan's Patent*, 33 W. R. 96; 51 L. T. R. 190.

POOR LAW.—*Settlement—Evidence—Sailor stopping with Mother—'Residence'—Irremovability.*—A sailor while on shore at intervals from 1876 to 1881 lived with his mother at *A.*, and helped her with his earnings, but had no bedroom of his own in the house. He afterwards became a pauper: Held, that he had no 'residence' within the meaning of 39 & 40 Vict. c. 61. s. 34 in the *A.* union giving him a status of irremovability, and must be deemed to be settled in the union where he was born. (C. A., Dec. 11, 1884.) *Guardians of Merthyr Tydvil* v. *Guardians of Stepney Union*, 53 L. J., M. C. 12.

POWER.—*Exercise—Appointment to Persons not objects—Gift over on Failure—Election.*—The donee of a special testamentary power of appointment over a fund appointed two ¼ths of it to objects of the power, and the two other ¼ths to persons not objects of the power, and declared that upon failure of the trusts of any ¼th part, such ¼th should be held upon the trusts of the other ¼ths: Held, that by virtue of such gift over the badly appointed half of the fund went to the persons who were objects of the power, and that no case of election arose though the objects of the power took benefits under the will in other property of the appointor. (Pearson J., July 31, 1884.) *Re Swinburne, Swinburne* v. *Pitt*, 27 Ch. D. 696; 54 L. J., Ch. 229.

Exercise—Death of Appointee—Lapsed Share—Intention to treat as Assets—Covenant for further Assurance.—*H.*, in the exercise of a general power of appointment under a settlement, gave her residuary real and personal estate upon trust for her three cousins under her will; one of the three cousins pre-deceased the testatrix: Held, that the testatrix had shown an intention to make the property comprised in the power of appointment her own, and that the lapsed share of personalty passed to her next-of-kin, and not to persons who were entitled under the settlement in default of appointment.

The settlement recited that *H.* was entitled to certain freeholds, and contained a covenant for further assurance. *H.* was at the time only entitled to $\frac{1}{16}$ths of the freeholds, but afterwards became entitled to the other $\frac{15}{16}$ths: Held, that the appointees and the heir-at-law as to such share as had lapsed were entitled either by estoppel or under the covenant to a conveyance of the $\frac{1}{16}$ths. (Kay J., June 26, 1884.) *Re Horton, Horton* v. *Perks, Horton* v. *Clark*, 51 L. T. R. 420.

PRACTICE.—*Administration action*—Order 55, Rule 10, for the determination of questions without a judgment, only applies to originating summonses. *Borthwick* v. *Ranaford*, 28 Ch. D. 79; 33 W. R. 161.

Admiralty.—Action of restraint—Form of bail bond in. 'The Robert Dickinson,' 10 P. D. 15. Costs of counter claim—Security ordered to be given for, by plaintiff, a sovereign prince. 'The Newbattle,' 33 W. R. 318. Costs of parties, where money paid into Court in satisfaction by defendant has been found sufficient. 'The William Lymington,' 10 P. D. 1; 51 L. T. R. 461.

Appeal.—Costs not allowed to successful appellant where note of judgment appealed from had not been taken. (C. A.) *Re M'Connell, Sanders* v. *M'Connell*, 33 W. R. 359. Costs not allowed where no notice given of a preliminary objection which proved fatal. *Re Blinkhorn, Ex parte Blease*, 14 Q. B. D. 123. Cross-notice of, rights of respondent on withdrawal of appeal. (C. A.) 'The Beeswing,' 10 P. D. 18; 33 W. R. 319.

PRACTICE—(continued).

Evidence (fresh) not admissible without leave on appeal from an order on summons in an administration action. (C. A.) *Re Compton, Norton* v. *Compton*, 27 Ch. D. 392; 33 W. R. 160; 51 L. T. R. 277. House of Lords, to, will not lie direct from Divorce Division. (H. L.) *Clearer* v. *Clearer*, 9 App. Cas. 631.

Appearance set aside where the address given was illusory. *Edell* v. *Care*, 33 W. R. 208; 51 L. T. R. 621.

Bankruptcy—Costs, direction as to, under Rule 98, must be at the hearing. (C. A.) *Re Angell, Ex parte Shoolbred*, 33 W. R. 202. Costs of Official Receiver, respondent to a successful appeal, allowed out of the assets. *Re Dale, Ex parte Leicestershire Banking Co.*, 14 Q. B. D. 48.

Chambers—Application to Judge, at, from refusal of Chief Clerk, must be within twenty-one days. *Re Norwich Equitable Fire Insurance Co., Re Brasnett's Case*, 33 W. R. 270.

Costs—Bankruptcy of defendant-trustee, after electing to go on, personally liable for costs. (C. A.) *Borneman* v. *Wilson*, 28 Ch. D. 53; 33 W. R. 141. Breach of promise action, when less than 50*l.* recovered, Order 65, Rule 12, not applicable. *Saywood* v. *Cross*, 14 Q. B. D. 53; 33 W. R. 135. Delay in proceeding, disallowance of costs for. *Turner* v. *Davis*, 33 W. R. 320; 51 L. T. R. 854. Jurisdiction still in High Court over costs of action ordered to be tried in County Court. (C. A.) *Emeny* v. *Sandes*, 14 Q. B. D. 6. Interest payable on, from date of judgment. *Landowners' West of England Drainage Co.* v. *Ashford*, 33 W. R. 41. Order of Divorce Division enforced in Chancery, needless expense. *Blackett* v. *Blackett*, 51 L. T. R. 427. Security for, appeal of, ordered, though novel point raised. *Farrer* v. *Lacy Hartland Co.*, 33 W. R. 265; foreign plaintiff who had come within the jurisdiction not ordered to give, (C. A.) *Ebrard* v. *Gassier* and *Baume*, 33 W. R. 287; interpleader issue, defendant ordered to give, (C. A.) *Tomlinson* v. *The Land and Finance Corporation*, 53 L. J., Q. B. 561; trustee in bankruptcy, not shown to be insolvent, not ordered to give, (C. A.) *Pooley* v. *Whetham*, 28 Ch. D. 38; 51 L. T. R. 608.

County Court—Appeal from, where allowed on terms, terms cannot be reviewed by High Court. *Pritchard* v. *Pritchard*, 14 Q. B. D. 55; 33 W. R. 198. New trial, application to discharge order for, irregularly made, should be to the County Court Judge, not by prohibition. *Evan Jones* v. *Gittens*, 51 L. T. R. 599. New trial of action remitted under 19 & 20 Vict. c. 108. s. 26, application for, must be made within four days. *Pritchard* v. *Pritchard* (No. 2), 14 Q. B. D. 55; 33 W. R. 198. Remitting action for tort under 30 & 31 Vict. c. 142. s. 10—'visible means' of paying costs. (C. A.) *Lea* v. *Parker*, 13 Q. B. D. 835; 54 L. J., Q. B. 38.

Discovery—Interrogatories—Embarrassing and irrelevant answer insufficient, *Lyell* v. *Kennedy*, 33 W. R. 44; facts exclusively establishing adversary's case cannot be asked for, *Bidder* v. *Bridges*, 33 W. R. 272; 51 L. T. R. 818. Privilege—communications by solicitor to solicitor, *Foakes* v. *Webb*, 33 W. R. 249; 51 L. T. R. 624; information derived from privileged reports of servants, *London, Tilbury, and Southend Ry. Co.* v. *Kirk and Randall*, 51 L. T. R. 599; viva voce examination on, unduly protracted, costs disallowed, *Litchfield* v. *Jones*, 33 W. R. 251; 51 L. T. R. 572.

Divorce—Interrogatories may be allowed in a nullity suit. (C. A.) *Harvey* v. *Lovekin*, 33 W. R. 188. Intervention before decree absolute, by reason of material facts not brought before Court, allowable, whether the facts were not brought before the Court intentionally or unintentionally. *Howarth* v. *Howarth*, 9 P. D. 218.

Evidence.—Examination abroad not ordered where material witness was not shown to be unable to come to England. *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137; 33 W. R. 160. Examiner may adjourn examination without consent of witness. *Re Metropolitan Electric Light Co., Ex parte Offor*, 51 L. T. R. 816. Secondary evidence not allowed to be given of document when notice to produce had not been given. *Sugg* v. *Bray*, 51 L. T. R. 194.

Fees under order as to Supreme Court Fees, 1884, sched. 52, payable on entering for trial a rule nisi against a justice. *Ex parte Hasker*, 14 Q. B. D. 82.

PRACTICE—(continued).

Joinder of causes of action—Action for recovery of land joined with another cause of action without leave—Irregularity held to be waived under Order 70, r. 2, by defendant entering an appearance. *Mulkern* v. *Doerks*, 53 L. J., Q. B. 526; 51 L. T. R. 429. Irregularity in joining action for recovery of land with another action without leave cannot be cured by plaintiff omitting one cause of action in his statement of claim. *Wilmott* v. *Freehold House Property Co.*, 51 L. T. R. 552.

Judgment contrary to finding of jury—New trial ordered. *Perkins* v. *Dangerfield*, 51 L. T. R. 535.

Mandamus—Pleading to return of unconditional compliance. (C. A.) *Reg.* v. *Justices of Pirehill North*, 14 Q. B. D. 13.

Mortgage—Foreclosure judgment made on summons for account under Order 15, r. 1. *Davies* v. *Smith*, 33 W. R. 211.

Particulars ordered where claim was for a definite sum as distinguished from an account. (C. A.) *Blackie* v. *Osmaston*, 28 Ch. D. 119; 33 W. R. 158.

Parties—Change of—Infant becoming trustee made co-defendant. *Re Gould*, 51 L. T. R. 417.

Partnership—Plaintiff in action against firm cannot sign judgment against one partner for default of appearance if another partner has appeared. *Adam* v. *Townend*, 14 Q. B. D. 103.

Pauper—Leave to present a petition as, granted on motion. Semble leave may be obtained on summons. *Re Lewin*, 33 W. R. 128.

Payment into Court in satisfaction with denial of liability, accepted.—plaintiffs entitled to have their costs taxed and paid without proceeding to judgment. *M'Ilwraith* v. *Green*, 13 Q. B. D. 897.

Probate—Affidavit sworn before German Judge admitted under 21 & 22 Vict. c. 95. s. 31, British Consul not being allowed by German law to administer an oath. *In the Goods of Henry Fawcus*, 9 P. D. 241.

Scandalous matter may be struck out by the Court in any proceedings before it. *Re Miller, Love* v. *Hills*, 33 W. R. 210.

Service on solicitor of defendant, issuing execution against defendant. *Re — a Solicitor*, 33 W. R. 131.

Staying payment out of a fund ordered to be paid out; terms. (C. A.) *Bradford* v. *Young*, 33 W. R. 159.

Third party cannot counterclaim against plaintiff. (C. A.) *Eden* v. *Weardale Iron and Coal Co.*, 33 W. R. 241; 51 L. T. R. 726.

Time—Signing judgment after lapse of one year—notice to defendant, Order 13, r. 3. (C. A.) *Webster* v. *Myer*, 51 L. T. R. 560.

Trial—Notice of, cannot be allowed to be given by defendant till after the six weeks which the plaintiff has under Order 36, r. 12 has expired. *Saunders* v. *Pawley*, 33 W. R. 277.

Trial by Jury—Defendant's right to, under Order 36, r. 6. *The Oil Mill Co.* v. *The Dunkinfield Local Board*, 51 L. T. R. 414.

Writ of Summons.—Service on mortgagee resident in Scotland for rent—leave—Order 11, r. 1, subs. (*b*), (*e*). (C. A.) *Agnew* v. *Usher*, 33 W. R. 126. Service out of jurisdiction on necessary party under Order 11, r. 1, subs. (*g*), when allowed. *Yorkshire Tannery Co.* v. *Eglington Chemical Co.*, 33 W. R. 162. Special indorsement for arrears of alimony pendente lite, plaintiff cannot sign judgment for, under Order 14, r. 1. (C. A.) *Bailey* v. *Bailey*, 13 Q. B. D. 855.

PRINCIPAL AND AGENT.—*Agent's Liability—Broker signing as 'Broker'—Undisclosed Principal—Arbitrators—Jurisdiction—Construction of Contract.*—Defendants acting for undisclosed principals signed a contract as 'Eaton & Son, Brokers,' the contract providing that allowance for inferiority in quality of the goods sold, together with any dispute arising on the contract, should be settled by arbitration. The goods proved inferior, and on a reference the award found that E. & Sons were not personally liable, on the ground that there was a custom that brokers who named their principal before

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performance, which E. and Sons had done, were not personally liable. A jury afterwards found that the supposed custom did not exist: Held, that the award was not conclusive, the arbitrators having no jurisdiction under the arbitration clause to inquire into the existence of the custom, and that defendants were personally liable. (C. A., diss. Fry, L.J., Aug. 8, 1884.) *Hutcheson & Co.* v. *Eaton & Sons*, 13 Q. B. D. 861.

Power of Attorney—Promissory Notes—Power to 'Negotiate'—Pledge.—*W.* gave *N.* a power of attorney 'to negotiate, make sale, dispose of, assign, and transfer, all or any of the government promissory notes' standing in his name: Held, that the power did not authorise *N.* to indorse the notes by way of pledge, and that the indorsee who had notice of the power of attorney must deliver them up to *W.* (P. C., March 1, 1884.) *Jonmenjoy Coondoo* v. *Watson*, 9 App. Cas. 561; 50 L. T. R. 411.

PROBATE.—*Converted Realty—Will disposing of—Right to Probate—Probate and Legacy Duty.*—A will disposing of real estate impressed with the qualities of personal estate is entitled to probate, and probate and legacy duty are payable upon it. (Aug. 5, 1884.) *In the Goods of Ann Gunn*, 9 P. D. 242; 53 P. D. & A. 107; 33 W. R. 169.

Revocation—Intention—Second Will Evidence—Variation—Memorandum.—A testator made a will in 1864. In 1877 he made another will, which was lost, but there was evidence to show that it altered the dispositions of the first. There was also a memorandum on the first will as follows—'This will is now useless, a new will having been made in October, 1877': Held, that the first will was entitled to probate in the absence of evidence to show that the second will revoked the first or was inconsistent with it. Quære whether the memorandum was admissible in evidence to show an intention to revoke. (May 30, 1884.) *Hellier* v. *Hellier*, 9 P. D. 237; 53 L. J., P. D. & A. 105.

RAILWAY COMPANY.—*Carrier—Uniform Rate for varying Distances—Railway Clauses Act—Breach—Railway and Canal Traffic Act—Action.*—A railway company charged a uniform rate for the carriage of coals from a group of collieries at varying distances along their line: Held, that the company had committed a breach of sect. 90 of the Railway Clauses Act, 1845, providing that the tolls should be charged equally to all persons for goods of the same description 'passing only over the same portion of the line of railway,' and that the owner of the nearest colliery could recover the amount of the overcharges but not general damages. Sect. 90 applies though the termini of the transit do not correspond. An action does not lie for breach of the Railway and Canal Traffic Act, 1854, sect. 2. (July 5, 1884.) *The Manchester, Sheffield, and Lincolnshire Railway Company* v. *The Denaby Main Colliery Company*, 13 Q. B. D. 674; 53 L. J. 579; since reversed (14 Q. B. D. 209).

Private Siding—Signalling Apparatus—Order of Board of Trade—Expenses—Removal of Junction—Injunction.—The Board of Trade ordered a railway company to have the points at the junction of a private siding with the company's line interlocked with signals. The company called upon the owner of the private siding to agree to pay the expenses of the alteration, and on his refusal removed the junction: Held, that they had no right to do so under the Railway Clauses Act. (V.C. B., Nov. 1, 1884.) *Woodruff* v. *Brecon and Merthyr Tydfil Railway Company*, 33 W. R. 951. Since affirmed on other grounds (28 Ch. D. 190).

RATE.—*Poor-rate—Assessment Committee—Valuation Act—Amendment—'Notice' to Overseers—Refusal—Mandamus.*—An assessment committee after hearing an objector amended the list and gave notice of the amendment to the overseers, so that they might alter their current rate: the overseers refused on the ground that they were, under s. 1 of the Union Assessment Committee Amendment Act, 1864, entitled to notice of the meeting of the committee to hear objections: Held, that they were not entitled. (Dec. 15, 1884.) *Reg.* v. *Overseers of Llangriville*, 14 Q. B. D. 83; 33 W. R. 213.

Poor-rate—'Beneficial Occupation'—Rateability—School Board premises.—A school board is assessable to poor-rate in respect of the premises owned by or let to them for the purposes of an elementary school if such premises are capable of a beneficial occu-

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pation, though the Board do not and cannot derive any profit out of them. (C. A., May 29, 1884.) *West Bromwich School Board* v. *Overseers of West Bromwich*, 13 Q. B. D. 929.

Poor-rate Rateability—Telephone Posts—Exclusive Occupation—Licence.—A telephone company carried their wires along posts fixed in the township of *M.*, and attached to the roofs of houses in the same township, under agreements with the owners or occupiers: Held, that the company had an exclusive occupation and not a user by mere licence, and were rateable to the poor. (C. A., Dec. 2, 1884.) *Lancashire and Cheshire Telephone Exchange Company* v. *Overseers of Manchester*, 14 Q. B. D. 267.

RENT CHARGE.—*Charge on Devised Land—Assignment of Part of Land—Personal Liability of Assignee.*—Land was devised charged with the payment of an annuity. The devisee sold part of the land: Held, that the assignee was personally liable in an action of debt by the annuitant for arrears of the annuity, and that it made no difference whether the annuity was charged by will or deed. (C. A., Nov. 28, 1884.) *Booth* v. *Smith* (No. 2), 33 W. R. 142.

Recovery—Action for Debt—Abolition of Real Actions—Occupier of part—Liability—Contribution.—By a private Act of Parliament passed in 1797, a vicar was to have all the remedies of a landlord for recovery of a tithe commutation rent charge created by the Act: *B.* was the occupier of part of the land so charged: Held, that real actions being now abolished the vicar was entitled to maintain an action in respect of arrears of the rent charge against *B.*, and to do so in respect of arrears of the *whole* rent charge: *B.*'s remedy being to claim contribution from the co-owners or occupiers of the land charged. (C. A., April 25, 1884.) *Christie* v. *Barker*, 53 L. J., Q. B. 537.

REVENUE.—*Income Tax—Deductions—Premium on Lease.*—A trader paid 34,000*l.* premium for a twenty-two years' lease of his premises with a ground-rent of 250*l.* a year: Held, that he was not entitled, in ascertaining for the purpose of assessment under Schedule D. of the Income Tax Act what were his profits and gains, to deduct in each year one twenty-second part of the premium as diminishing capital, but only the fair rental of the house for the year during which he computed his profits. (Dec. 18, 1884.) *Gillatt & Watts* v. *Colquhoun*, 33 W. R. 258.

Income Tax—Deductions—Royalties—Dead Rent.—The Royalties derived from working a leased coal mine amounted in one year to 3,477*l.*, of this 1477*l.* was repaid to the lessees under an agreement in the lease for dead rent paid by them to the lessor in the two preceding years: Held, notwithstanding, that the 1477*l.* so returned was assessable to income tax as profits under the Income Tax Act, 1842, s. 60, No. 3, v. 3. (Dec. 17, 1884.) *Broughton* v. *Plas Power Coal Company*, v. *Kirkpatrick*, 33 W. R. 278.

SETTLED LAND ACT.—*Capital Moneys—Application—Discharge of 'Incumbrances'—Loan for Drainage before Act.*—A tenant for life of settled land before the date of the Settled Land Act borrowed large sums, under the Improvement of Land Act, 1864, for effecting drainage improvements upon the settled land: Held, that the tenant for life was not entitled to have the remaining instalments of the loan paid off out of the proceeds of sale of part of the settled land, as an 'incumbrance affecting the inheritance of the settled land' within the meaning of sect. 21 (ii.) of the Settled Land Act. 'Incumbrances' in sect. 21 (ii.) means perpetual incumbrances, such as mortgages, portions, &c. (Pearson J., July 17, 1884.) *Re Knatchbull's Settled Estate*, 27 Ch. D. 349; 33 W. R. 10.

'Settlement'—Original and Derivative Settlements—Appointment of Trustees—Relatives.—A complete settlement was made of real estate. Afterwards under a power of appointment contained in the settlement, the real estate was, on the marriage of a daughter, appointed and settled: Held, that the original and not the derivative settlement was 'the settlement' under the Settled Land Act, 1882, s. 2. subs. 1. Two near relatives will not be appointed trustees under the Act. (Pearson J., August 12, 1884.) *Re Knowles' Settled Estates*, 27 Ch. D. 707; 51. L. T. R. 655.

SHIP AND SHIPPING.—*Charterparty—Stamp—Execution out of United Kingdom—Stamp Act.*—Where a charterparty had been entirely executed at a place out of the United Kingdom, and afterwards stamped within two months after it was first received in the United Kingdom, the Court held that it was admissible in evidence as duly stamped within s. 15 of the Stamp Act, ss. 67 and 68 not applying. (August 4, 1884.) *The Belfort*, 9 P. D. 215; 53 L. J., P. D. & A. 88; 33 W. R. 171; 51 L. T. R. 271.

Navigation—Collision—Duty to Reverse—Both Ships to Blame.—The *L.*, a French steamship, ran down the *T.*, an English steamship. The *T.* had reversed when the collision was imminent, but had not been navigated with due care and vigilance. The *L.* had not reversed: Held, that both vessels were to blame. (H. L., June 23, 1884.) *Maclaren* v. *Compagnie Française de Navigation à Vapeur*, 9 App. Cas. 640.

Navigation—Fog—'Moderate Speed'—Collision—Sailing Rules.—If a steamship at sea in a dense fog hears a whistle indicating another vessel at a distance of a mile or a mile and a half she ought to reduce her speed to moderate: if the whistling is repeated and shows the other vessel coming closer, she ought to come to as complete a standstill as possible without getting out of command, and if necessary stop and reverse, under Art. 18 of the Regulations for preventing Collision at Sea. 'Moderate speed' in Art. 13 varies according as the ship is on the open sea or in a river or narrow arm of the sea. (C. A., Dec. 6, 1884.) *The Dordogne*, 10 P. D. 6.

Wages of Master—Misconduct—Forfeiture—Mortgage.—The master of a mortgaged ship after the mortgagee had taken possession by putting a man on board, in obedience to the orders of mortgagor took the ship to sea: Held, that he had been guilty of misconduct disentitling him as against the mortgagee to any wages from the time when the mortgagee became in legal possession. (Nov. 25, 1884.) *The Fairport*, 10 P. D. 13.

SOLICITOR.—*Bill of Costs—Action upon items insufficiently described—Judgment for part.*—Where a solicitor's bill of costs lumps together various items, this is not a sufficient description of his 'fees, charges, and disbursements' to satisfy 6 and 7 Vict., c. 73, sect. 37, but it does not prevent the solicitor from recovering for the other items which are sufficiently described in his bill, if they constitute a substantial amount. (Nov. 1, 1884.) *Blake* v. *Hummell*, 51 L. T. R. 430.

Solicitor—Executor—'Professional charges.'—A solicitor was appointed co-executor of a will (drawn by himself) and authorised to make 'the usual professional charges' as if he were employed by the executor: Held, that all items not of a strictly professional character had been properly disallowed on taxation: (Kay J., July 4, 1884.) *Re Chapple, Newton* v. *Chapman*, 27 Ch. D. 584.

SPECIFIC PERFORMANCE.—*Lease—Refusal to execute—Appointment of person to execute—Trustee Act.*—Where a decree had been made for specific performance of an agreement to grant a lease and the defendant refused to comply, the Court under sect. 30 of the Trustee Act, 1850, declared her a trustee and appointed a person to execute the lease in her place. (Kay J., July 24, 1884.) *Hall* v. *Hale*, 51 L. T. R. 226.

TIMBER.—*Whether severed—Trees blown down by storm—Criterion.*—Where a large number of trees on an estate were blown down by a violent storm just before the owner's death, the Court on a summons to ascertain the rights of the real and personal representatives, declared that such of the trees as were so far blown down that they could not longer grow in their natural mode as trees were severed, and formed part of the personalty, but that such as were merely blown out of the perpendicular remained realty, and directed a surveyor to report. (Pearson J., Nov. 30, 1884.) *Re Ainslie, Swinburne* v. *Ainslie*, 28 Ch. D. 89; 33 W. R. 195.

TORT.—*'Interesse Termini'—Injury to—Right of action.*—*G.* agreed to hire a theatre for eight weeks, to begin from a future day. Before entry by *G.* the theatre had to be closed, owing to excavations by the defendants (adjoining proprietors) which rendered it unsafe: Held, that *G.*'s interesse termini was a proprietary right enabling him to maintain an action. (C. A., July 15, 1884.) *Gillard* v. *Cheshire Lines Committee*, 32 W. R. 943.

TRADE MARK.—*Rectification of Register—Five Years' Registration—Conclusiveness—Improper mark.*—Although five years have elapsed from the registration of a trade mark, it is competent to any person aggrieved by the registration to show that the trade mark is one which never ought to have been registered: sect. 76 of the Patent Designs and Trade Marks Act, 1883, which makes five years conclusive, being controlled by sect. 90. (Chitty J., August 11, 1884.) *Re Lloyd & Sons' Trade Mark, Lloyd* v. *Bottomley*, 27 Ch. D. 646; 54 L. J., Ch. 66.

Rectification of register—Restricted user—Note of.—Where the words 'Cruiskeen Lawn' had been registered as a mark for whiskey by two manufacturers under an agreement that the user should be restricted, the Court gave leave to rectify the register of trade marks by adding a note of the restrictions, notice of such rectification to be given to the comptroller. (Chitty J., Nov. 21, 1884.) *Re Mitchell & Company, Houghton* v. *Hall Trademarks*, 33 W. R. 148.

Registration—Name of Firm—Words in common use—'Distinctive manner'—Similarity—Duty of Comptroller.—Label containing the name of a firm printed in common letters and enclosing the words 'National Sperm,' held not such a label as ought to be registered as a trade mark under sect. 64 of the Patent Designs and Trade Marks Act, 1883, the name not being distinctive, and the words in common use. Where an application is made to register a label so like another already registered as to be calculated to deceive, it is the Comptroller's duty under sect. 72 to refuse registration until authorised by the Court. (Pearson J., July 4, 1884.) *Re Price's Patent Candle Co.*, 27 Ch. D. 681; 51 L. T. R. 653.

TRUSTEE.—*Breach of trust—Investment on mortgage—Valuer—Employing mortgagor's agent.*—Trustees, with a view to investing the trust fund (5000*l.*) on the mortgage of a house at Liverpool, employed, on the recommendation of their solicitors, the mortgagor's agent, who was a London surveyor and had been puffing the proposed security, to make a valuation of it. The security was at the time only worth from 4000*l.* to 6000*l.*, but it afterwards became deficient by depreciation of the property: Held, that the trustees had delegated to their solicitors what was not within the scope of a solicitor's business, the choice of a valuer, and must replace the whole fund. (Kay J., Aug. 1. 1884.) *Fry* v. *Tapson*, 28 Ch. D. 268; 33 W. R. 113; 51 L. T. R. 326.

Breach of trust—Leaving trust fund too long at bank.—Trustees while looking out for a new investment for the trust fund, left part of it for fourteen months on deposit at a bank. The bank having failed: Held, that the trustees had committed a breach of trust in leaving the fund so long on deposit, and were liable for the loss sustained. (Kay J., Oct. 31, 1884.) *Cann* v. *Cann*, 33 W. R. 40.

VENDOR AND PURCHASER.—*Agreement—Mistake as to part of subject-matter—'Consensus ad idem'—Correspondence.*—Plaintiff brought an action for specific performance of an alleged agreement by defendants to sell to him an English patent and certain foreign patents: Held, that the fact that the plaintiffs, on an erroneous construction of the agreement, claimed that it comprised more than it did (i. e. the foreign patents as well as the English), did not prevent there being the consensus ad idem essential to a contract; and the plaintiff waiving his claim to the foreign patents, the Court granted an injunction to prevent the English patent being dealt with pending the hearing. (C. A., Aug. 8, 1884.) *Preston* v. *Luck*, 27 Ch. D. 497.

Conditions of sale—Interest on purchase money—Payment into bank.—On a sale, one of the conditions provided that if 'from any cause whatever' the purchase should not be completed on a certain day, interest at 5 per cent. should be paid on the balance of the purchase money: the vendor having claimed to rescind the contract, the purchaser on the day of completion placed the balance of the purchase money on deposit at a bank at 2½ per cent.: Held, on the Court affirming the contract, that the vendor could not claim more than the 2½ per cent. (V.C. B., Aug. 6, 1884.) *Re Monckton & Gilzean* (No. 2), 27 Ch. D. 555.

Covenants for Title—Sale by Trustees—Equitable Tenant for Life—Conditions of sale.—On a sale by trustees of land vested in them, under a power exercisable with

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the consent of the tenant for life, one of the conditions of sale provided that the vendors being trustees were only to give the statutory covenant against incumbrances: Held, that this proviso did not preclude the purchaser from insisting on the equitable tenant for life entering into the ordinary covenants for title qualified in the manner mentioned in Dart, Vendor and Purchaser, fifth edition, 548. (Kay J., Aug. 11, 1884.) *Re Sawyer & Baring's Contract*, 53 L. J., Ch. 1104; 33 W. R. 26; 51 L. T. R. 356.

Misrepresentation — Sale under direction of Court — Setting aside — 'Suppressio veri.'—*C.* made an offer for the purchase of a life interest in a fund forming part of the estate of a person whose estate was being administered under the direction of the Court, and obtained the sanction of the Judge to the purchase by furnishing evidence as to the value of the cestui que vie's life which *C.* knew to be incomplete and calculated to produce a false impression: Held, that the sanction of the Court had been obtained by fraud, and that the purchase must be set aside though after the lapse of nine years. (C. A., July 31, 1884.) *Boswell* v. *Coaks*, 27 Ch. D. 424; 51 L. T. R. 242.

Title—Abstract of deed not in Vendor's possession—Expense of production—Conveyancing Act, 1881.—A purchaser, entitled under an open contract to a forty years' title, required the vendor to produce an abstract of an indenture of Oct. 14, 1854, not in the vendor's possession: Held, that under sect. 3 (6) of the Conveyancing Act, 1881, the purchaser must pay the expense of procuring the abstract. (Pearson J., Oct 30, 1884.) *Re Johnson & Tustin*, 28 Ch. D. 84; 54 L. J., Ch. 43; 33 W. R. 43; 51 L. T. R. 656.

WILL.—*Devise—After-acquired property—Will speaking from death—'Contrary intention.'*—A testator devised to his son *G.* 'all my cottage and land at *S.*' with directions for the preservation of plantations, heaths, and shrubs 'in their present state.' After the date of his will, the testator contracted to buy from *G.* ten acres of land at *S.*, with a mansion house upon it adjoining the cottage: Held, that the land so bought passed, by force of sect. 24 of the Wills Act, under the specific devise to *G.*, there being no expression of a contrary intention. (Kay J., Aug. 12, 1884.) *Re Portal & Lamb*, 27 Ch. D. 600; 53 L. J., Ch. 1163; 33 W. R. 71; 51 L. T. R. 392.

APPENDIX OF CASES.

BANKRUPTCY.—*Relation back of Trustee's Title—Ship Building Contract—Charge on Moneys earned—Bankruptcy before Completion.*—Charge given by a ship-builder upon moneys already earned by him under a ship-building contract held good notwithstanding the bankruptcy of the ship-builder before the completion of the contract. (Dec. 19, 1884.) *Re Toward, Ex parte Moss*, 14 Q. B. D. 310.

BASTARDY.—*Witness 'coming' voluntarily—Refusal to Answer—Jurisdiction of Justices to commit.*—The words 'any person coming' before the Justices in sect. 70 of the Bastardy Act, 1842, on the hearing of a bastardy summons, include a person who volunteers as a witness, and such witness may be committed under the Act, if he refuses to answer relevant questions. (Dec. 16, 1884.) *Reg.* v. *Flavell*, 14 Q. B. D. 364; 33 W. R. 343.

CRIMINAL LAW.—*Homicide—Justification—Necessity—Self-preservation—Killing innocent Neighbour.*—Prisoners who were English sailors being cast away at sea in an open boat killed a boy who was with them and lived on his flesh until rescued. The men had been seven days without food and there was no likelihood, unless one of them was killed, of the others' lives being saved: Held, no such necessity as to justify the killing and that the prisoners were guilty of wilful murder. (Dec. 9, 1884.) *Reg.* v. *Dudley & Stephens*, 14 Q. B. D. 273; 33 W. R. 347.

INFANT.—*Maintenance—Contingent Legacy—Intermediate Income—Conveyancing Act*, 1881.—Section 43 of the Conveyancing Act, 1881, empowering trustees to apply the income of property held by them 'in trust for an infant contingently on his attaining

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the age of twenty-one years,' does not apply to income which passes as residue to another person, to which the infant never could become entitled. (Kay J., Dec. 6, 1884.) *Re Dickson, Hill* v. *Grant*, 33 W. R. 334.

INHERITANCE.—*Descent—Equitable Estate—Legal Estate—Merger—Ex parte Materna or Paterna.*—Where a son derived an equitable estate in fee in freehold from his father and the legal estate from his mother: Held, on his death intestate, that the equitable estate merged in the legal and that the descent must be traced ex parte materna, not ex parte paterna. (Pearson J., Dec. 16, 1884.) *Re Douglas, Wood* v. *Douglas*, 28 Ch. D. 327.

LANDLORD AND TENANT.—*Ejectment—Non-payment of Rent—Relief—Costs.—Common Law Procedure Act.*—A lessee who seeks relief against forfeiture for non-payment of rent under the Common Law Procedure will not be required to pay the costs other than the costs of the summons for relief, if the lessor has brought ejectment after tender of the arrears of rent. (C. A., Feb. 4, 1884.) *Croft* v. *The London and County Banking Company*, 14 Q. B. D. 347.

LANDS CLAUSES ACT.—*Costs—Power to Award—Entry on Land—'Taking Land.'*—A railway company entered upon land with the requisite formalities under sect. 85 of the L. C. C. A. The company afterwards obtained leave to abandon it on paying compensation, and entered into an agreement with the landowner as to the amount of compensation: Held, that the Court had power to allow the costs of such agreement out of the moneys deposited in Court, as incident to the 'taking of land' within sect. 80. (C. A., Nov. 10, 1884.) *Charlton* v. *Rolleston*, 28 Ch. D. 237; 51 L. T. R. 612.

LOCAL GOVERNMENT.—*'Sewers—Drain—Stopping up—Local Board—Right to Injunction.*—A drain made along a street not vested in the local authority becomes a sewer within the meaning of sect. 4 of the Public Health Act as soon as it is connected with more than one house in the street, such drain not being one made by a person 'for his own profit,' and the local authority is entitled to an injunction to restrain its being stopped up. (Kay J., Nov. 19, 1884.) *Acton Local Board* v. *Batten*, 28 Ch. D. 283; 52 L. T. R. 17.

MISTAKE.—*Agreement—Executed deed—Unilateral Mistake—Rescission—Rectification.*—Where one party to a deed intended to enter into a different agreement to that contained in the deed but the other party did not, the mistaken party is entitled to rescission. Rectification is the proper remedy only where the mistake is common to both parties. (V.C. B., July 7, 1884.) *Paget* v. *Marshall*, 28 Ch. D. 255.

POOR LAW.—*Guardians—Salaried Clerk of Highway Board—Disqualification.*—A clerk of a highway board who receives a salary out of the highway fund is not disqualified by 5 & 6 Vict. c. 57. sect. 14 from serving as a guardian of the poor in the same union. (Dec. 5, 1884.) *Reg.* v. *Rawlins, Reg.* v. *Dibbin*, 14 Q. B. D. 325.

Settlement—Children—Permanent Residence—Father's power to fix—Intention.—A father who resided in the *H.* union placed his two legitimate children, aged respectively three and five, with a person residing in the *C.* union, paying a weekly sum for their maintenance, and visiting them occasionally: Held, on the facts that he had manifested an intention that the children should make their home there and that on becoming paupers they were chargeable to the *C.* union. (Dec. 15, 1884.) *Guardians of Holborn* v. *Guardians of Chertsey*, 33 W. R. 344.

POOR RATE.—*Assessment—Overseers—Requisition for provisional List—Obligation to furnish—Value unchanged.*—Overseers are not bound to furnish a provisional list under sect. 47 of the Valuation (Metropolis) Act, 1869, to the assessment committee if they come to the conclusion that there is no alteration in the value of the property assessed. (Nov. 22, 1884.) *Reg.* v. *Overseers of St. Mary, Bermondsey*, 14 Q. B. D. 351.

POWER.—*Exercise—Condition by Donee—Benefit to Stranger—Validity.*—A condition bona fide imposed by the donee of a power that the appointee shall resettle the appointed property so as to confer a benefit on persons not objects of the powers does not invalidate the appointment if the condition is not a sine qua non of the appointment. (C. A., Dec. 15, 1884.) *Re Turner's Settled Estates*, 28 Ch. D. 205; 33 W. R. 265.

PRACTICE.—*Ecclesiastical Law.*—Particulars ordered to be given by promoters in a criminal suit against a Clerk in Holy Orders, though the pleadings had closed. (Jan. 7, 1885.) *Bishop of Salisbury* v. *Ottley*, 10 P. D. 20.

Interpleader.—An appeal will lie from the judgment of the Court or Judge at Chambers in a summary way on an issue of fact or finding of law in an interpleader proceeding, though it will not lie under O. 57. r. 11 from his decision disposing of the whole matter in a summary way. (C. A., Jan. 21, 1885.) *Dawson* v. *Fox*, 14 Q. B. D. 377.

RAILWAY COMPANY.—*Passenger's Luggage—Delivery to Passenger—Leaving in charge of Porter.*—A passenger's boxes were taken out of the van on her arrival at the station and were left by her with a porter, she saying that she would send for them. The porter replied, 'All right. I'll put them on one side and take care of them.' One of the boxes having been lost: Held, that the Company was not liable, there having been a delivery to the passenger, and a re-delivery by her to the porter. *Quære* whether the porter was personally liable? (March 14, 1884.) *Hodkinson* v. *London & North Western Railway Company*, 14 Q. B. D. 228; 32 W. R. 662.

RENT CHARGE.—*Release of part of land subject to—Annuitant's right against unreleased part.—G.* being the owner of land subject to a rent-charge sold part of it to *W. G.* afterwards sold the remainder of the land, the annuitant on the sale of the second part releasing the rent-charge: Held, that the operation of sect. 10 of Lord St. Leonard's Act was not to extinguish the rent-charge, but to entitle the annuitant to recover from *W.* such a proportion of it only as was represented by the part of the land sold to him. (C. A., Nov. 28, 1884.) *Booth* v. *Smith* (No. 1), 14 Q. B. D. 318; 32 W. R. 142; 51 L. T. R. 742.

SETTLEMENT.—*Windfalls—Larch plantations—Application of proceeds—Tenant for Life and Remainderman.*—Land containing large plantations of larch was on a marriage conveyed to trustees upon trust, after providing for outgoings to pay the rents and profits to the husband and wife successively, with remainder to the children: Held, by Pearson J., that the trustees must apply the proceeds in replanting, invest the residue, and pay the income to the tenant for life: Held, by the Court of Appeal, that subject to maintaining the plantations, the trustees must keep up the income of the tenant for life to what it had averaged from the plantations during previous years, and for this purpose resort to the corpus, if necessary. (C. A., Dec. 17, 1884.) *Re Harrison's Trusts, Harrison* v *Harrison*, 28 Ch. D. 220; 33 W. R. 240.

SHIP AND SHIPPING.—*Bill of lading—Indorsement by way of security—Unpaid freight—Liability of Indorsee*—Where a bill of lading is indorsed to secure an advance, the property in the goods comprised in the bill of lading does not pass to the indorsee under sect. 1 of the Bills of Lading Act so as to render him liable to the shipowner for freight. (C. A., reversed H. L., Dec. 5, 1884.) *Sewell* v. *Burdick*, 10 App. Cas. 74.

Limitation of Liability—Space for berthing Crew—Deduction.—Foreign shipowners in an action for limitation of liability are entitled under the Merchant Shipping Act, 1854, to deduct from the registered tonnage the spaces enclosed for the use of the crew, but they are not entitled to the further deductions allowed by the Act of 1867 unless they have complied with its provisions. (Dec. 10, 1884.) *The Palermo*, 10 P. D. 21.

VENDOR AND PURCHASER.—*Misrepresentation—Misleading description of property—'Garden enclosed with Wall'—Rescission—Compensation.—B.* bought for building purposes a house and garden with a long frontage to a road, the garden being described in the particular as 'enclosed by a rustic wall with tradesmen's side entrance.' The vendor knew but did not disclose the fact that the wall was not, as it appeared to be, part of the property: Held, a material misrepresentation entitling *B.* to rescind and not a matter for compensation. (North J., Nov. 23, 1884.) *Brewer* v. *Brown*, 28 Ch. D. 309.

Frauds, Statute of—'Note or Memorandum'—Specific performance.—In an action for specific performance of an agreement to sell certain leasehold property, the only evidence in writing was the following receipt by defendant: 'Sept. 22, 1882. Received by *J. S.* one pound of my share in the *B.* property, the sum of 200*l.* (Signed) W.'—and a subsequent letter by defendant, in these terms: 'Mr. Studds, Sir—If the balance of 199*l.* on account of the purchase money of my share of the property be not paid on or before the 22nd inst., I shall consider the agreement (made Sept. 22, 1882) not any longer binding:' Held, that the documents read together constituted a sufficient note or memorandum in writing within sect. 4 of the Statute of Frauds. (North J., Nov. 20, 1884.) *Studds* v. *Watson*, 28 Ch. D. 305; 33 W. R. 118.

It is intended to publish with the Law Quarterly Review for January, 1886, *a general Consolidated Digest of Cases reported in* 1885.